

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-6016

United States Court of Appeals

For the Second Circuit

Docket No. 77-6016

BRISTOL-MYERS COMPANY

Plaintiff-Appellant,

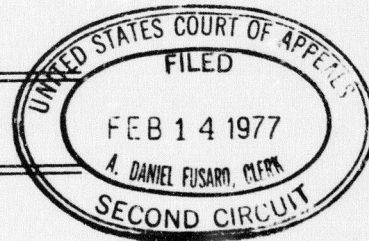
against

FEDERAL TRADE COMMISSION, et al,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX



WEIL, GUTTMAN & DAVIS

Attorneys for Plaintiff-Appellant

60 East 42nd Street

New York, New York 10017

(212) 687-8573

ROBERT B. FISKE, JR.

United States Attorney for

the Southern District of New York

Attorney for Defendants-Appellees

One St. Andrew's Plaza

New York, New York 10007

(212) 791-1963

PAGINATION AS IN ORIGINAL COPY

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Docket Entries

Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
June 9-76	Filed complaint and issued summons.
June 29-76	Filed summons and Marshals return - served: 6-16-76 Atty. Gen'l, Dept. of Justice, Wash., DC - cert. mail #233577; Calvin J. Collier FTC Wash., DC - cert. mail #233580; Paul Rand Dixon FTC Wash., DC - cert. mail #233579; Elizabeth Hanford Dole FTC., Wash., DC - cert. mail 233581; F.T.C., Wash., DC - cert. mail #233582.
Aug. 20-76	Filed affidavit and notice of motion of defendants for an order to dismiss this action returnable 9-3-76.
Aug. 20-76	Filed defendants' memorandum in support of their motion to dismiss pursuant to Rule 12(b)(1) 12(b)(6).
Sept. 10-76	Filed plaintiff's memorandum in opposition to defendants' motion to dismiss.
Sept. 10-76	Filed plaintiff's affidavit of Gerald Guttman in opposition to defendants' motion to dismiss.
Sept. 14-76	Filed stipulation and order adj. defendants' motion to 9-17-76, etc. - Metzner, J.
Sept. 21-76	Filed stipulation and order adj. defendants' motion to dismiss to 9-24-76, - Metzner, J.
Oct. 4-76	Filed reply memorandum of law on behalf of defendants.
Dec. 30-76	Filed OPINION #45490... Defendants' motion to dismiss under Rule 12(b)(1) and 12(b)(6) is granted -- Metzner, J.
Jan. 6-77	Filed judgment and order in favor of defendants dismissing the complaint.
Jan. 12-77	Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from order of 12-30-76 - mailed copies.
Jan. 12-77	Filed undertaking for costs on appeal in the amount of \$250.00 by National Surety Corporation.

Judgment Dismissing Complaint

JAN 6 1977
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
BRISTOL-MYERS COMPANY

Plaintiff

: 76 Civil 2556 (CMM)

-against-

FEDERAL TRADE COMMISSION, CALVIN J.
COLLIER, CHAIRMAN, PAUL RAND DIXON,
ELIZABETH HANFORD DOLE,
COMMISSIONERS

Defendants

: JUDGMENT

----- X
Defendants having moved the Court pursuant to Rules 12(b)(1) and 12(b)(6),
of the Federal Rules of Civil Procedure, and the said motion having come on
to be heard before the Honorable Charles C. Metzner, United States District
Judge and the Court thereafter on December 30, 1976, having handed down
its opinion granting defendants' motion, it is,

ORDERED ADJUDGED and DECREED: That defendants FEDERAL TRADE
COMMISSION, CALVIN J. COLLIER, Chairman, PAUL RAND DIXON,
ELIZABETH HANFORD DOLE, Commissioners, have judgment against
plaintiff BRISTOL-MYERS COMPANY dismissing the complaint.

Dated: New York, N.Y.
January 6, 1977

Clerk :

MICROFILM

JAN 06 1977

Opinion of the District Court granting defendants

Motion to Dismiss the Complaint under

Rule 12(b)(1) and 12(b)(6)

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
BRISTOL-MYERS COMPANY, :
 :
 Plaintiff, :
 : 76 Civ. 2556
 -against- : (CMM)
 :
 FEDERAL TRADE COMMISSION, CALVIN :
 J. COLLIER, Chairman, et al., :
 : #45490
 Defendants. :
 :
----- x

METZNER, D. J.:

Defendants move for an order dismissing the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. This motion is granted.

The background to this action begins on February 23, 1973, when the Federal Trade Commission issued an administrative complaint charging, inter alia, Bristol-Myers Company with misleading and unfair advertising with respect to certain of its products.

During a prehearing conference held on March 3, 1976, the administrative law judge ruled that proposed expert witnesses for the Commission were entitled, if they so desired, to have counsel for the Commission present

at any interview conducted by counsel for Bristol-Myers, and that Commission counsel could communicate this ruling to all such expert witnesses. These guidelines also applied to interviews requested by Commission counsel of expert witnesses for Bristol-Myers.

On March 12, 1976, Bristol-Myers requested that the administrative law judge permit discovery to determine whether any of the Commission's counsel had instructed expert witnesses not to be interviewed without Commission counsel being present. This application was denied, as was a motion for reconsideration. The administrative law judge concluded that Bristol-Myers had shown no justification other than mere suspicion for this collateral discovery and that Bristol-Myers could move for appropriate relief if any case of improper influence came to light during any of the interviews of individual witnesses.

By petition, Bristol-Myers sought discretionary review by the Federal Trade Commission. This was denied.

Finally, on June 9, 1976, plaintiff instituted the instant action requesting this court to order the Commission to allow it to conduct discovery into whether counsel for the Commission improperly influenced any of their prospective witnesses not to grant ex parte interviews to plaintiff's counsel.

Bristol-Myers has failed to persuade this court that judicial intervention would be appropriate here. This claim is asserted prematurely and is properly dismissed for failure to exhaust administrative remedies. Judicial review of Federal Trade Commission proceedings is governed by Section 45(c) of Title 15, United States Code, which limits the power of review to final cease and desist orders. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

"Agency action made reviewable by statute . . . [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

If formal adjudicative procedures subsequently result in a cease and desist order, it seems clear that on review by a court of appeals Bristol-Myers will have an opportunity to press the claim that it was entitled to this discovery. Bristol-Myers Company v. Federal Trade Commission, 469 F.2d 1116 (2d Cir. 1972).

Of course, this court would intervene where the preliminary procedural agency action threatened so irreparable an injury as to justify interlocutory resort to corrective judicial process. Bristol-Myers Company, *supra* at 1118. Bristol-Myers' alleged injury does not rise to this level. Its reliance on International Business Machines Corp. v. Edelstein, 526 F.2d 37 (2d Cir. 1975) is misplaced.

The impairment of the constitutional right to effective assistance of counsel in that case involved the trial judge's ruling that a transcript be made of all interviews of a witness in the absence of opposing counsel.

In this instance the administrative law judge permitted the opposing counsel to be present if the expert witness so requested. The evidence of any improper influence that in effect denied plaintiff the effective assistance of counsel is little more than mere suspicion.

It should be quite easy at the beginning of each interview for plaintiff, by appropriate questioning, to ascertain the facts and make a record for action by the administrative law judge.

Accordingly, defendant's motion is granted.

So ordered.

Dated: New York, N. Y.
December 30, 1976

/s/ CHARLES M. METZNER
U. S. D. J.

Summons and Complaint

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

BRISTOL-MYERS COMPANY ,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants .

SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon

WEIL, GUTTMAN & DAVIS

plaintiff's attorneys , whose address is

60 East 42nd Street
New York, New York 10017

an answer to the complaint which is herewith served upon you, within 60 days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date

[Seal of Court]

NOTE — This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BRISTOL-MYERS COMPANY,

Plaintiff,

Civil Action No.

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

COMPLAINT

Defendants.
-----X

Plaintiff, by its attorneys, Weil, Guttman & Davis,
complains of defendants as follows:

FIRST: Plaintiff is a corporation organized, exist-
ing and doing business under the laws of the State of Delaware,
having its principal place of business at 345 Park Avenue, New
York, New York.

SECOND: Defendant, Federal Trade Commission (here-
inafter sometimes "FTC"), is an agency of the United States of
America created pursuant to the Federal Trade Commission Act,
38 Stat. 717, 15 USC §41 et seq., having its principal place
of business within the District of Columbia. The individual
defendants are sued herein as Commissioners of FTC, having
their offices in FTC's offices in Washington, D. C.

THIRD: The matter in controversy herein exceeds the
value of \$10,000 exclusive of interest and costs; and arises
under the laws of the United States; and the jurisdiction of
this Court to determine the within action is invoked under

the Administrative Procedure Act, 5 USC §§702, 703, 704 and 706, and under 28 USC §§1331 and 1337; and under the Fifth Amendment of the Constitution of the United States of America.

FOURTH: On or about February 23, 1973 FTC issued an administrative complaint (FTC docket number 8917) against plaintiff and two other respondents pursuant to the Federal Trade Commission Act §5(b), 15 USC §45(b).

FIFTH: A prehearing order in the said administrative proceeding identifies 46 separate issues of fact to be tried against plaintiff in the course thereof. The witness list of complaint counsel designates 65 expert witnesses and an indeterminate number of others said counsel intend to present during the course of said hearings. Their documents list identifies 706 documents to be introduced into evidence in the course thereof. Upon such and other information, and belief based upon it, the evidentiary hearing will be a long and expensive one for all parties involved in it.

SIXTH: Upon information and belief, communications by FTC trial lawyers to prospective witnesses in the above proceeding have been intended and effective to bias said witnesses against agreeing (as would otherwise have been their own disposition) to grant voluntary interviews to counsel for Bristol-Myers Company without complaint counsel being present, thus prospectively depriving plaintiff of a fair trial in said proceeding.

SEVENTH: Upon information and belief, FTC trial lawyers, on the authorization of the administrative law judge in said proceeding, have communicated to their prospective witnesses the said law judge's ruling that they may, if they

wish, refuse to be interviewed by counsel for Bristol-Myers Company outside the presence of complaint counsel, which has had the effect of improperly influencing and prejudicing the prospective witnesses not to grant ex parte interviews to plaintiff's counsel, thus further depriving plaintiff of its fundamental right to a fair trial.

EIGHTH: In order to obtain concrete and specific evidence of the aforesaid facts, and thus to lay a foundation for moving for such remedial measures by FTC as would then appear appropriate, plaintiff applied to FTC for permission to depose complaint counsel with respect to such matters.

NINTH: FTC has denied with finality plaintiff's said application, and has also, with finality, denied plaintiff permission to interview such witnesses as to such matters separately from interviews as to the merits of the proceeding. Thus, plaintiff is now in the position, as the result of the actions of the FTC and its trial lawyers, of having either to abandon its right to interview such witnesses as to the merits of the administrative proceeding, or to conduct such interviewing in the presence of adverse trial counsel.

TENTH: The result of the foregoing will be either (a) that plaintiff will be irrevocably deprived of a fair trial or (b) that a lengthy and expensive administrative hearing will be wasted if the facts asserted in Paragraphs SIXTH and SEVENTH above are ultimately brought out in the course thereof, or otherwise, and the said hearing therefore has to be set aside.

ELEVENTH: Unless plaintiff is enabled to depose FTC trial attorneys, and such other FTC personnel as may have been involved with respect to the above alleged matters, and to depose their prospective witnesses regarding them without losing its right to later and separately interview and depose on the merits of the administrative proceeding, prior to the commencement of the hearings therein, it will be irreparably injured; it will have no adequate remedy at law; and its constitutional right to procedural due process will be violated.

WHEREFORE, plaintiff respectfully prays for judgment:

(1) ordering the defendants to permit plaintiff to depose their trial attorneys and all other personnel whose testimony will constitute, produce, or can reasonably be expected to lead to evidence relevant to the matters hereinabove alleged;

(2) ordering the defendants to produce for inspection and duplication physical, documentary or electronic materials which will constitute, produce, or can reasonably be expected to lead to evidence relevant to the matters hereinabove alleged;

(3) ordering the defendants to permit plaintiff to depose FTC's prospective witnesses in the hereinabove referred to administrative proceeding with respect to the matters hereinabove alleged, without sacrificing plaintiff's right to depose them at a later time on the merits of the said administrative proceeding, after proper remedial measures have been effected to correct the actions of the defendants

and their trial attorneys hereinabove alleged, and to protect plaintiff from being prejudiced thereby;

(4) enjoining defendants from proceeding with the hereinabove described administrative hearing until the discovery described in sub-paragraphs (1), (2) and (3) above has taken place, and a reasonable time has thereafter been allowed to plaintiff to seek such appropriate remedial measures as may be called for in the light of such discovery.

Dated: New York, New York
June 9, 1976

Respectfully submitted,
WEIL, GUTTMAN & DAVIS

By Gerald Guttman
Attorneys for Plaintiff
60 East 42nd Street
New York, New York 10017
(212) 687-8573

Defendants' Notice of Motion to Dismiss
with affidavit of Louis G. Corsi

LC:an

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BRISTOL-HERTS COMPANY, :

Plaintiff, :

-against- :

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners, :

Defendants. :

NOTICE OF
MOTION

: 76 Civ 2556 (CJR)

-----X
SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit with exhibits of Louis G. Corsi, the memorandum submitted herewith and all other papers and proceedings herein, the defendants Federal Trade Commission, Calvin J. Collier, Paul Rand Dixon, and Elizabeth Hanford Dole, will move this Court on the 3rd day of September at 10:00 A.M. in Room 2201 of the United States Courthouse, Foley Square, New York, New York, pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing this action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, and for costs and such other and further relief as may be just.

Dated: N.Y., N.Y.
August 20, 1976

Yours, etc.

ROBERT B. FISKE, Jr.
United States Attorney
Attorney for Defendants

By: *Louis G. Corsi*

LOUIS G. CORSI
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York
Tel: 791-1966

TO: WEIL GUTTMAN & DAVIS
60 East 42nd Street
New York, New York

LC:am

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BRISTOL-MYERS COMPANY,

Plaintiff,

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman; PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

:

:

: AFFIDAVIT

: 76 Civ 2556 (C124)

:

:

:

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK : ss:
SOUTHERN DISTRICT OF NEW YORK)

LOUIS G. CORSI, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in
the office of Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York, counsel for the
defendants herein. I submit this affidavit in support of
the defendants' motion, pursuant to Rule 12(b)(1) and (b)(6)
of the Federal Rules of Civil Procedure, to dismiss this
action for lack of subject matter jurisdiction and for
failure to state a claim upon which relief may be granted.

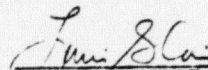
2. Attached hereto, as described below, are
copies of the following documents:

(a) a portion of the transcript of a proceeding
held on March 3, 1976 before the Administrative Law Judge
in the matter entitled Bristol-Myers Company, et al., FTC
Docket No. 8917 (Exhibit A);

(b) three orders dated March 23, April 5 and April 20, 1976, respectively, of the Administrative Law Judge in that proceeding (Exhibits B, C and D respectively); and

(c) an order dated May 25, 1976 of the Federal Trade Commission in that proceeding. (Exhibit E) All of these documents directly concern matters raised in the complaint in this action, and are relevant and necessary to the Court's consideration of the defendants' motion to dismiss.

WHEREFORE, for the reasons fully set forth in the memorandum submitted herewith on behalf of the defendants, it is requested that this Court dismiss the complaint, and award the defendants costs and such other relief as may be appropriate.



LOUIS G. CORSI
Assistant United States Attorney

Sworn to before me this
20 day of August 1976

15

Notary Public

LAWRENCE MASON
Notary Public, State of New York
No. 00-05725-6
Qualified in Bronx County
Commission Expires March 31, 1977

OFFICIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE
Federal Trade Commission

DOCKET NO. 3917

In the Matter of:

BRISTOL MYERS COMPANY, et al
a corporation.

Place Washington, D. C.

Date March 3, 1976

Pages 365 - 394

Alderson Reporting Company, Inc.

Official Reporters

300 Seventh St., S. W. Washington, D. C.

NA 8-2345

CONTENTS

NONE

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EXHIBITS

10

11

NONE

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1 on the wrong end. We are on both ends and they are both
2 wrong. Service is deemed, I believe, to be completed, by
3 the Commission, by a filing down here. Our service is deemed to
4 be completed when our papers are received down here. In
5 between, there can be many, many unfortunate and disastrous
6 gaps in the time we receive what has been filed by the
7 Commission down here and --

8 JUDGE HYUN: Mr. Weil, I think as to -- I am
9 not sure that that is accurate as to the service being control-
10 led by date of filing. I think it is controlled by date
11 of mailing by the Secretary's office. Isn't that true?

12 MR. WEIL: No. I believe it is the date that
13 Complaint Counsel file with the Secretary, so we have
14 whatever delay takes place in the Secretary's office, and
15 probably they are as expeditious as they can be, but I am
16 sure they are human beings and are overloaded --

17 JUDGE HYUN: I know they are not. I can attest to
18 that from my experience, substantially, from the time of
19 filing to the time of mailing.

20 MR. WEIL: I can attest that the postal service is
21 certainly not expeditious.

22 JUDGE HYUN: I can see the problem.

23 MR. WEIL: I don't know when and if ever that may
24 arise, but I hope, if it does, Your Honor will be understanding
25 if we come back to you and ask for some recognition of that

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1 problem.

2 We will have filed with Your Honor -- did you
3 bring a courtesy copy -- all right, then, Your Honor has
4 already received our latest filing -- the motion for the
5 Protective Order, and I merely note that. I am sure Your
6 Honor will want to deliberate on it before making a decision.

7 The final thing that I have is to frankly take a
8 bit of offense at what I read as being an accusation of
9 impropriety on my part. This appears in footnote no. 7 at
10 page 9 of Complaint Counsel's response to your Order to
11 Show Cause. Complaint Counsel evidently feel, and assert, that
12 there is something wrong in the efforts we have been
13 making to have their witnesses grant us interviews without
14 Complaint Counsel being present.

15 I submit, Your Honor, there is absolutely nothing
16 wrong with that. I think we are perfectly within our rights
17 in asking for that favor, even though it is their witnesses
18 and beyond that I am sure it is nothing that they cannot
19 protect themselves on and probably already have, by notifying
20 or telling these witnesses that they need not meet with us without
21 Complaint Counsel or some other of the Federal Trade Commission
22 representative being present.

23 As a matter of fact, I would like to inquire whether
24 that has not, in fact, been done? Are they really hurt?
25 Do you want to answer that question, Ms. McCoy?

21

1 JUDGE HYUN: You address your remarks to me.

2 MR. IL: Yes, I am sorry. I request your Honor,
3 if he thinks it fit, to find out. This is a serious accusation.
4 I think it is unwarranted on the two counts. Number one,
5 that we have not done anything wrong, and number two that
6 it is nothing that Complaint Counsel are not in a perfectly
7 good position to protect themselves on and I am sure they
8 have, and if Your Honor would like to inquire into that, I
9 would appreciate it.

10 JUDGE HYUN: Well, I noted the same footnote you
11 referred to and I don't think any offense was meant by their
12 statement there. They take a different position as to the
13 issue and I would like to have it resolved this morning.

14 Ms. McCoy?

15 MS. McCOY: Well, Your Honor is right -- we didn't mean
16 to allege any impropriety in this attempt. We do, however,
17 feel that if the witness would like a member of the Federal
18 Trade Commission counsel to be present, that that is his
19 prerogative, and, in fact, we would like to be present, and
20 we think it is really our right to be present at any of these
21 meetings.

22 JUDGE HYUN: Now, which is it? It is two different
23 things.

24 MS. McCOY: I think it is both. In many cases, the
25 witness, in calling us, has asked to have us present, and, in

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1 fact, in those situations where the witness has not asked
2 us to be present, we have suggested that one of us be
3 present at such meetings. We think it is appropriate and
4 is our right to be present at any meeting Respondent's counsel
5 has with our witnesses. Certainly, if there was a deposition,
6 we would have the right to be present, and I don't think a
7 voluntary interview, which simply means you don't have to go
8 through the necessity of having a deposition, is any different.
9 Certainly, it is a practice in every other case I have ever
10 encountered before the Commission that whenever a counsel for
11 the other side interviews a witness, that counsel for that
12 witness's side is present, and we would certainly expect
13 the same to occur with Respondent's witnesses, we would
14 expect to have them there -- we would have no objection to it.

15 JUDGE HYUN: Well, I don't think that what you have
16 just said is a uniform practice among Commission proceedings --
17 I don't think so. Anyway --

18 MS. McCOY: All I can say is it has been the uniform
19 practice in any proceeding I have had anything to do with.

20 JUDGE HYUN: Mr. Weil?

21 MR. WEIL: What triggered me, Your Honor, was the
22 end of the second half of that sentence, which said that,
23 "Complaint Counsel object to Respondent's attempts to preclude
24 their presence".

25 If they object to it, it must mean they deem it

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1 objectionable, and I know of nothing that is objectionable
2 about it.

3 JUDGE HYUN: All right. Well, now, I know the
4 parties positions. I have given some thought to this issue.
5 As you say, Ms. McCoy, if this were formal depositions,
6 there is no question all of the parties would have notice and
7 have a right to be there, but this is going to be on a
8 voluntary basis.

9 As to lay witnesses, I think the general practice
10 is to leave this matter to individual witnesses. He
11 could have counsel of his choice at the time of interview
12 and that counsel may be Commission counsel -- it doesn't
13 matter.

14 Now, as to the -- the same rule should apply to
15 expert witnesses. Our rule we decide on this morning is
16 going to apply to experts for either side. I can understand
17 your desire to be there. I realize that these experts,
18 although they are independent, have been working in close
19 association with you in connection with reviews of documents,
20 literature, and working out the outline of testimony and so
21 forth. I realize that, so that you would want to guard against
22 any surprises, and also would want to know what is going on at
23 these interviews.

24 On the other hand, with respect to the issues of
25 reasonableness and also the issue of substantial question, a

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1 great deal is going to depend on what these experts say
2 and how much weight is to be given to their testimony.

3 Now, one way to meet the opponent's expert testimony,
4 I suppose, is to present an expert of your own who would
5 give contrary expert opinion. Now, that invites numbers
6 game and I am resolved to do everything in my power to prevent
7 that from occurring. In view of that, I think that perhaps
8 the most effective way of meeting Opponent's expert testimony
9 is an opportunity to impeach his credibility and for that
10 purpose I think that an Opponent should be given every
11 reasonable opportunity to pursue that course, including inter-
12 views with Opponent's prospective expert witnesses.

13 Therefore, my ruling on this issue is that with
14 respect to interviews of expert witnesses conducted on a
15 voluntary basis, counsel of Opponent -- strike that -- the
16 party calling that expert witness may be present at the interview
17 of that witness by the other party provided that is a desire
18 of that expert witness concerned, and Government counsel have
19 my permission to communicate my ruling to your witnesses.

20 MS. McCOY: Thank you.

21 JUDGE HYUN: And, of course, as I said, the same
22 guidelines will apply with respect to Respondent's expert
23 witnesses.

24 Now, with respect to the Respondent's Motion For
25 Protective Order, I read it very quickly this morning, and I

1 would like to state that I would like to study it before I
2 rule on the motion, but at this time if Ms. McCoy has a
3 position on it, I would like to hear it.

4 MS. McCOY: Your Honor, the Protective Order, which
5 the Respondents are asking, would obviously not apply to us.
6 In that regard, we feel like we do not have much say in it.
7 As long as it is understood that we are not objecting to
8 any such protective order, is in no way a waiver of our right to
9 certain -- these are not confidential -- treatment, and we
10 not be hindared in our use of them during the trial. With
11 that understood, we would have no objection to a protective
12 order between Bristol Myers and the other Respondents in the
13 other cases being entered. We are really more concerned,
14 obviously, with the protective order not putting any hindrance
15 on our use of the documents.

16 JUDGE HYUN: If I were to grant Respondent's
17 Order, would it hinder your use of these documents?

18 MS. McCOY: No, I don't think it would because as
19 I understand it, it would only apply between Bristol-Myers
20 and the Respondents in the other cases.

21 JUDGE HYUN: I see.

22 MR. WEIL: Your Honor, just so that the record will
23 be clear -- with regard to your previous ruling that Complaint
24 Counsel could communicate your ruling to the prospective
25 witnesses, I would like the record to note that does give me a

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1 problem because I think the mere fact they hear from
2 Complaint Counsel with what Ms. McCoy has described as a
3 "suggestion", would itself be an inhibition upon them that
4 maybe they better have them there and would influence and bias
5 what might otherwise be their spontaneous approach and
6 attitudes if they simply heard from me and I was requesting an
7 interview. I think it might not occur to them to think
8 I want Complaint Counsel there, but hearing from Complaint
9 Counsel and maybe the tone of voice could very well alter
10 what would have been their own individual approach. It is
11 not an easy problem, I know, Your Honor.

12 JUDGE HYUN: You have a point there, Mr. Weil. My
13 intention, in giving Complaint Counsel permission to
14 communicate with the expert witnesses, was to prepare the
15 witnesses for the possibility that they might get conflicting
16 positions from the parties when they are being questioned.

17 MR. WEIL: That is exactly why we want to interview
18 them.

19 MS. MCCOY: Your Honor, may I comment?

20 JUDGE HYUN: Yes.

21 MS. MCCOY: I think, for all practical purposes,
22 Mr. Weil's point is unrealistic because the witnesses have,
23 for the most part, already contacted us and said they have
24 received a letter from Mr. Weil who wants to set up a meeting.
25 They question whether, in fact, the meeting should be held,

1 and we have encouraged our witnesses to meet with Mr. Weil
2 and other attorneys, and they then say, we would like you to
3 be there, without our suggesting the point. These people know
4 what is going on. Many of them have testified in proceedings
5 before, and they have no desire, at least from what they
6 have communicated to us, to meet with Mr. Weil and the
7 other attorneys on Respondents' side without having us present,
8 so, I think, in virtually no case, is it ever going to occur
9 the witnesses would not automatically think to ask whether we
10 could be present. This is how we have, of course, heard about
11 the fact Mr. Weil has contacted them and has even made this
12 suggestion.

13 JUDGE HYUN: I think -- I appreciate your point,
14 Mr. Weil -- however, I am going to stand by my ruling with
15 the understanding the same rule will apply to both sides.

16 Is there anything else?

17 MS. McCOY: The only other thing we have is in your
18 ruling of February 19, 1976, you directed us to turn over to
19 the Respondents, on or before March 3, which is today, a copy
20 of each of our exhibits listed on our exhibit list. We have
21 done so with the exception of CX-704, which is the Curriculum
22 Vitae of Dr. Harry Davis, one of our experts. We have
23 attempted, on numerous occasions, to get this. Dr. Davis is
24 evidently out of town. His secretary does not seem to know
25 where they are. All I can say is we are attempting to provide

28

1 it to the Respondents as quickly as possible. Certainly, I
2 don't think this is a particularly important document which
3 its delay is in any way going to prejudice the Respondents.

4 JUDGE HYUN: How about the Commission survey
5 documents?

6 MS. McCOY: The report of that document is not
7 in existence yet so obviously that has not been turned over.
8 I guess, in that category also is CX-514, which is noted as
9 the Report of the Food & Drug Administration's Panel Evaluating
10 Analgesics. That document is not in existence at this time
11 either. We have no idea when, in fact, it will be.

12 JUDGE HYUN: In other words, with respect to the
13 two groups of documents you just referred to, it is your
14 intention to turn over the copies as soon as they become
15 available to you?

16 MS. McCOY: Yes, sir. FDA's, of course, we have no
17 control over. We know they are in the process of developing
18 a report. When that, of course, is available, we will turn
19 it over.

20 JUDGE HYUN: How about the Federal Trade Commission
21 survey?

22 MS. McCOY: That is listed as CX-349. Dr. Levitt
23 is in the process of preparing a report of this survey which was
24 under his direction, and as soon as that is in our hands, we
25 will turn it over to Respondents.

Exhibit B

-45a-

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
BRISTOL-MYERS COMPANY,
a corporation,
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

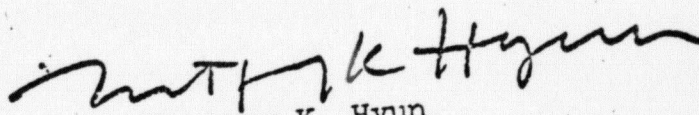
ORDER DENYING RESPONDENTS' APPLICATION FOR
ISSUANCE OF SUBPOENAS TO COMPLAINT COUNSEL
IN DOCKET NOS. 8917, 8918 AND 8919

By application dated March 12, 1976 and filed March 15, 1976, respondents in Bristol-Myers Company, et al., Docket No. 8917, seek subpoenas directed to complaint counsel in this proceeding and the other two companion analgesic cases, American Home Products Corporation, et al., Docket No. 8918, and Sterling Drug Inc., et al., Docket No. 8919, requiring them to produce certain documents and give testimony generally related to their contacts with complaint counsel's expert witnesses in Docket No. 8917. The sole purpose of this application is to determine whether any decision by any expert witness to have complaint counsel present at his interview with respondents' counsel has been, or may be, influenced by his contacts with any of the complaint counsel in the three companion cases. By response dated March 22, 1976, complaint counsel in Docket No. 8917 opposed respondents' instant application on behalf of all complaint counsel in the three cases.

I have determined that respondents' instant application should be denied. First, at the March 3, 1976 prehearing conference I set forth certain guidelines regarding the propriety of counsel's presence at the interviews of his witnesses by opposing counsel. Respondents' instant subpoena application is in effect an attempt to conduct an on-the-record inquisition to determine whether any of the complaint

counsel has improperly influenced any of the witnesses by his or her contacts and communications with a prospective witness. Respondents have shown no justification other than a mere suspicion that some witnesses may have been, or may be, influenced by complaint counsel in some manner inconsistent with the guidelines. In my view, respondents have utterly failed to justify the need for such an inquisition at this time. Secondly, respondents will be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas, and to move for appropriate relief should any case of improper influence come to light. Furthermore, respondents will receive from complaint counsel all statements of witnesses in complaint counsel's possession prior to their testimony.

Accordingly, respondents' March 12, 1976 application for issuance of subpoenas ad testificandum and subpoenas duces tecum to complaint counsel in Docket Nos. 8917, 8918 and 8919 is hereby denied.



Montgomery K. Hyun
Administrative Law Judge

March 23, 1976

Exhibit C

-48a-

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
BRISTOL-MYERS COMPANY,
a corporation,
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

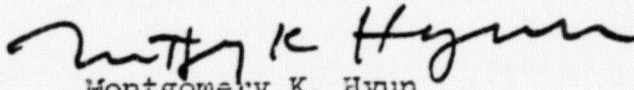
ORDER DENYING RESPONDENTS' MOTION FOR
RECONSIDERATION OF ORDER DENYING APPLICATION
FOR ISSUANCE OF SUBPOENAS TO COMPLAINT COUNSEL
IN DOCKET NOS. 8917, 8918 and 8919

By motion dated April 1, 1976, respondents seek reconsideration of my March 23, 1976 order denying their application for issuance of subpoenas addressed to complaint counsel in the three companion analgesic cases, Docket Nos. 8917, 8918 and 8919. Respondents' instant motion should be denied for the reason that it does not raise any new question or argument not considered by the administrative law judge. Respondents merely reiterate their suspicion that it is highly likely that complaint counsel improperly instructed the witnesses not to see respondents' counsel unless complaint counsel were present.

Respondents' request that they be permitted to interview complaint counsel's expert witnesses with respect to the issue of improper influence without complaint counsel's presence in all cases is also denied. Under the circumstances of this case, there is no need to subject complaint counsel's expert witnesses to repeated interviews by

respondents' counsel. Furthermore, such a procedure will needlessly prolong the pretrial proceedings and should be avoided. */ Accordingly,

IT IS ORDERED that respondents' April 1, 1976 motion for reconsideration of order denying respondents' application for issuance of subpoenas to complaint counsel in Docket Nos. 8917, 8918 and 8919 be, and the same hereby is, denied.


Montgomery K. Hyun
Administrative Law Judge

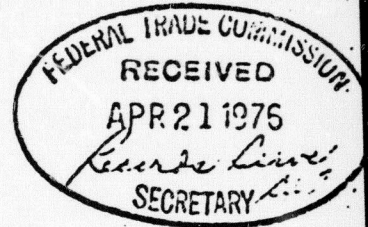
April 5, 1976

*/With respect to the administrative law judge's alleged failure to await respondents' reply of March 26, 1976, it should be stated that the administrative law judge understood the March 25, 1976 reference by Bristol-Myers' counsel to the "pending" application for issuance of subpoenas to the complaint counsel to mean Bristol-Myers' then pending application for issuance of subpoenas to the Commission, inasmuch as the administrative law judge assumed that his March 23, 1976 order ruling on respondents' application for issuance of subpoenas to complaint counsel in the three cases, the subject matter of the instant motion, had been served on respondents. The order ruling on respondents' then pending subpoena application was not issued until March 30, 1976.

Exhibit D

-51a-

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
BRISTOL-MYERS COMPANY,
a corporation,
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

ORDER DENYING RESPONDENT'S REQUEST FOR A
DETERMINATION PERMITTING AN INTERLOCUTORY APPEAL

By application dated April 15, 1976, respondent Bristol-Myers Company (Bristol-Myers) seeks a determination permitting an interlocutory appeal from the orders of March 23, 1976 and April 5, 1976, under Section 3.23(b) of the Commission's Rules of Practice. Bristol-Myers argues in essence that the administrative law judge failed to give due consideration to its offer to disclose to the administrative law judge certain evidence in camera which would have substantiated its suspicion that complaint counsel improperly influenced the decision of some of the complaint counsel's expert witnesses not to be interviewed by Bristol-Myers' counsel without the presence of complaint counsel. In other words, Bristol-Myers now asserts that the administrative law judge should have asked for the "evidence" before ruling on its motion for reconsideration. By response dated April 20, 1976 complaint counsel opposed Bristol-Myers' instant Section 3.23 application.

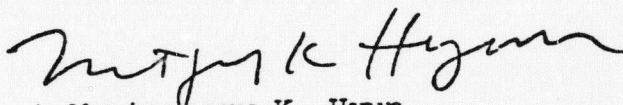
In my view, however, it was incumbent upon Bristol-Myers to submit to the administrative law judge any "evidence" with its motion for reconsideration if it indeed wished the "evidence" to be considered in conjunction with its motion. Since Bristol-Myers chose

not to do so, the administrative law judge correctly disposed of the reconsideration motion on the basis of moving papers then before him.

It is my intention to accord respondent all due process consistent with the requirements of an expeditious hearing. In my view, the procedure outlined in my March 23, 1976 order is adequate to safeguard respondent's due process rights with respect to pretrial discovery regarding anticipated testimony of complaint counsel's expert witnesses, including respondent's right to interview complaint counsel's prospective expert witnesses. As pointed out at the March 3, 1976 prehearing conference, under the Commission's Rules of Practice, complaint counsel would have a right to be present at any deposition of any of their witnesses being taken by Bristol-Myers, a rule in accord with federal court practice. In these circumstances, to expend valuable trial preparation time in collateral proceedings of this type in the name of due process would be carrying a good thing too far and is unwarranted.

Bristol-Myers has failed otherwise to satisfy the requirements set forth in Section 3.23(b) of the Rules for a favorable determination permitting an interlocutory appeal. Accordingly,

IT IS ORDERED that Bristol-Myers' April 15, 1976 request for a determination permitting an interlocutory appeal from the orders of March 23, 1976 and April 5, 1976, be, and the same hereby is, denied.



Montgomery K. Hyun
Administrative Law Judge

April 20, 1976

Exhibit E

-54a-

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation,
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

ORDER DENYING PETITION
FOR DISCRETIONARY REVIEW
BY THE COMMISSION

Respondent Bristol-Myers Company petitions the Commission to review several orders */ issued by the administrative law judge denying respondent's application for subpoenas directed to complaint counsel and denying its request for a determination pursuant to §3.23(b) of the Commission's Rules of Practice which would grant them permission to apply for Commission review of the law judge's discovery rulings.

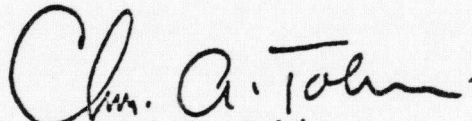
Respondent claims that the Commission has inherent authority to review any ruling by an administrative law judge. However, the Commission has ruled on numerous occasions that the administrative law judge has broad discretion in controlling the

*/ Order Denying Respondents' Application for Issuance of Subpoenas to Complaint Counsel in Docket Nos. 8917, 8918 and 8919, March 23, 1976; Order Denying Respondents' Motion for Reconsideration of Order Denying Application for Issuance of Subpoenas to Complaint Counsel in Docket Nos. 8917, 8918 and 8919, April 5, 1976; Order Denying Respondent's Request for a Determination Permitting an Interlocutory Appeal, April 20, 1976.

conduct of adjudicative proceedings, and his rulings will be upset only in cases of clear abuse. E.g., Kellogg Co., Docket No. 8883, Order Denying Applications for Review, May 29, 1974, at 3. There being no showing of a clear abuse of discretion, respondent's petition is denied.

IT IS SO ORDERED.

By the Commission.


Charles A. Tobin
Secretary

ISSUED: May 25, 1976

Defendants' Memorandum in Support of
Their Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BRISTOL-MYERS COMPANY,

: 76 Civ. 2556 (CRM)

Plaintiff,

- against -

FEDERAL TRADE COMMISSION,
et al.,

Defendants.
-----x

DEFENDANTS' MEMORANDUM IN
SUPPORT OF THEIR MOTION TO
DISMISS PURSUANT TO RULE
12(b)(1) and 12(b)(6)

Preliminary Statement

This memorandum is submitted on behalf of the defendants Federal Trade Commission (the "Commission"), and Calvin J. Collier, Paul Rand Dixon and Elizabeth Hanford Dole, sued herein in their official capacities as members of the Commission, in support of their motion to dismiss the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the Court has lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted.

BEST COPY AVAILABLE

Statement of Facts

On February 23, 1973 the Commission issued an administrative complaint (Commission Docket Number 8917) charging inter alia defendant Bristol-Myers Company with misleading and unfair advertising with respect to certain of its products (Bufferin, Excedrin and Excedrin PM), in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§45 and 52 (the "Act").*

During a prehearing conference on this matter held on March 3, 1976, the administrative law judge ("ALJ") ruled that proposed expert witnesses for the Commission were entitled, if they so desired, to have counsel for the Commission ("complaint counsel") present at any interview conducted by counsel for Bristol-Myers, and that complaint counsel was entitled to communicate this ruling to all such expert witnesses. The ALJ further ruled that these guidelines would also apply to interviews requested by complaint counsel of expert witnesses for Bristol-Myers. (A copy of the relevant portion of the transcript of the March 3, 1976 proceeding before the ALJ is submitted herewith as Exhibit A to the Corsi affidavit.)

* See CCH Trade Reg. Reporter, FTC Complaints and Orders, Transfer Binder 1970-73, ¶¶ 19,962 and 20,263. As noted in that material, two additional cases (Docket Nos. 8918 and 8919) were also initiated at that time; collectively, these three cases are known as the "analgesic cases".

By application dated March 12, 1976, Bristol-Myers requested the ALJ to issue a subpoena requiring complaint counsel to produce certain documents and give testimony regarding complaint counsel's contacts with the Commission's proposed expert witnesses. As the ALJ observed in its order dated March 23, 1976 denying Bristol-Myer's application,

"[Bristol-Myers'] instant subpoena application is in effect an attempt to conduct an on-the-record inquisition to determine whether any of the complaint counsel [in the analgesic cases] has improperly influenced any of the witnesses by his or her contacts and communications with a prospective witness. [to deny Bristol-Myers' request for an ex parte interview.]" (Exhibit B to the Corsi affidavit.)

The ALJ concluded that Bristol-Myers had shown "no justification other than a mere suspicion" that some witnesses may have been influenced by complaint counsel in a manner inconsistent with the guidelines set forth at the March 3, 1976 proceeding. (Id.) The ALJ ruled, however, that Bristol-Myers

"will be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas and to move for appropriate relief should any case of improper influence come to light." (Id.)*

* The ALJ further noted that Bristol-Myers had "utterly failed to justify the need for such an inquisition at this time". (Id.)

By order dated April 5, 1976, the ALJ denied Bristol-Myers' motion for reconsideration and its further application that it be permitted to conduct ex parte interviews of expert witnesses to gather evidence of complaint counsel's alleged improper conduct. The ALJ ruled that Bristol-Myers had merely reiterated its "suspicion" of improper conduct, and that the request for ex parte interviews on this matter would unnecessarily subject the expert witnesses to repeated interviews and would "needlessly prolong the pretrial proceedings." (Exhibit C to the Corsi affidavit.)

Thereafter, Bristol-Myers applied to the ALJ for an order, under Section 3.23(b) of the Commission's Rules of Practice*, permitting an interlocutory appeal from the orders of March 23 and April 5, 1976. In denying this application by order dated April 20, 1976, the ALJ noted that Bristol-Myer's offer to disclose in camera to the ALJ certain "evidence" which would have allegedly substantiated its suspicion of impropriety by complaint counsel was of no consequence; if Bristol-Myers had such evidence, the ALJ ruled, it was incumbent on Bristol-Myers to submit it to the ALJ for consideration. (Exhibit D to the Corsi affidavit.)

Beyond that, the ALJ reiterated:

* 16 C.F.R. §3.23(b)(1976).

"It is my intention to accord respondent all due process consistent with the requirements of an expeditious hearing. In my view, the procedure outlined in my March 23, 1976 order is adequate to safeguard respondent's due process rights with respect to pretrial discovery regarding anticipated testimony of complaint counsel's expert witnesses, including respondent's right to interview complaint counsel's prospective expert witnesses. As pointed out at the March 3, 1976 prehearing conference, under the Commission's Rules of Practice, complaint counsel would have a right to be present at any deposition of any of their witnesses being taken by Bristol-Myers, a rule in accord with federal court practice. In these circumstances, to expend valuable trial preparation time in collateral proceedings of this type in the name of due process would be carrying a good thing too far and is unwarranted." (Id.)

By petition dated May 3, 1976, Bristol-Myers sought discretionary review by the Commission of the three orders described above. Holding that there was "no showing of a clear abuse of discretion", the Commission denied Bristol-Myers' petition. (Exhibit E to the Corsi affidavit.)

On or about June 9, 1976, Bristol-Myers initiated this action, repeating its suspicions that complaint counsel had improperly influenced proposed expert witnesses to deny ex parte interviews (Complaint, ¶¶ SIXTH ad SEVENTH), and alleging that it is thereby being denied procedural due process in the administrative proceeding. (Complaint, ¶¶ TENTH and ELEVENTH). Based upon these naked allegations, Bristol-Myers has requested this Court to enjoin any further action in that administrative proceeding and order the

Commission to permit Bristol-Myers to (i) depose complaint counsel and all other personnel "whose testimony [inter alia] can reasonably be expected to lead to evidence relevant" to its suspicions of impropriety, (ii) produce all documentary and physical material "which [inter alia] can reasonably be expected to lead to evidence relevant" to such suspicions, and (iii) depose proposed expert witnesses concerning this matter, while reserving its right to depose such witnesses at a later time concerning the merits of the administrative proceeding.

Summary of the Argument

Simply stated, the present action is another attempt by Bristol-Myers to delay and disrupt the orderly administrative investigation and adjudication of the Commission's charges of misleading and unfair advertising against Bristol-Myers.* Since Bristol-Myers is asking this Court to intervene in an on-going agency proceeding, and concerning procedural and interlocutory matters in that proceeding, this Court should dismiss this action for failure to exhaust its administrative remedies. Moreover, should the Court reach the merits, the complaint should nonetheless be dismissed for failure to state a claim upon which relief can be granted since the ALJ's rulings are proper and well within the bounds of its broad discretion to control the conduct of the administrative proceeding.

* See Bristol-Myers Company v. FTC, 469 F. 2d 1116 (2d Cir. 1972).

ARGUMENT

POINT I

BRISTOL-MYERS' COMPLAINT
SHOULD BE DISMISSED FOR
FAILURE TO EXHAUST ADMINI-
STRATIVE REMEDIES

Both the Act and the Administrative Procedure Act (the "APA") makes it clear that the issue raised by Bristol-Myers in this action lies within the exclusive jurisdiction of the Court of Appeals and can be reviewed only after a final order, if any, is entered against Bristol-Myers at the conclusion of the administrative proceeding. Sections 5 (c) and (d) of the Act, 15 U.S.C. §§45 (c) and (d), provide for judicial review of the Commission's actions and state in relevant part:

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States ... by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.

* * *

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Section 10(c) of the APA, 5 U.S.C. §704 provides that:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." (Emphasis added.)

Indeed, the Second Circuit, in affirming the District Court's dismissal of an earlier action brought by Bristol-Myers which sought judicial intervention in another procedural aspect of the administrative proceeding involved here, explicitly stated:

"We believe that the claim is asserted prematurely and was properly dismissed for failure to exhaust administrative remedies. Judicial review of Federal Trade Commission proceedings is governed by section 45(c) of Title 15, United States Code, which limits the power of review to final cease and desist orders and which makes review available in the courts of appeals. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §704, provides:

Agency action made reviewable by statute. . .
[is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

If formal adjudicative procedures subsequently result in a cease and desist order directed against Bristol-Myers, it seems clear that on review by this or any other court of appeals the company will have an opportunity to press the claim that it was entitled by statute to subpoenas during the informal negotiating process. See *Frito-Lay, Inc. v. FTC*, 380 F. 2d 8 (5th Cir. 1967); cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49-50, 58 S. Ct. 459, 82 L. Ed. 638 (1938)."

Bristol-Myers Company v. FTC, 469 F. 2d 1116, 1117 (2d Cir. 1972) (Footnote omitted.) See Renegotiation Board v. Bannerkraft, 415 U. S. 1, 24 (1974); Sterling Drug, Inc. v. Weinberger, 509 F. 2d 1236, 1239 (2d Cir. 1975), aff'g, 384 F. Supp. 557 (S.D.N.Y. 1974); Pepsico, Inc. v. FTC, 472 F. 2d 179, 185-87 (2d Cir. 1972), cert. denied, 414 U. S. 876 (1973).

Adherence to the exhaustion doctrine is particularly appropriate in this situation since Bristol-Myers is again asking the Court to overturn a procedural ruling in an ongoing administrative proceeding. As the Fifth Circuit in Coca-Cola Company v. FTC, 475 F. 2d 299, 304 (5th Cir.) cert. denied, 414 U.S. 877 (1973) stated in a related context:

"The plaintiffs are asking that a procedural, 'case-handling' decision be overturned in media res to require joinder 'with the concomitant complication and clutter of the hearing.' L. Jaffe, Judicial Control of Administrative Action 444 (1965). If trial courts are insulated from this kind of interference, see 28 U.S.C. § 1292(a), certainly administrative tribunals ought to be and, indeed, they generally have been immune from interlocutory review of procedural rulings. E. g., Texaco, Inc. v. Federal Power Commission, 117 U. S. App. D. C. 268, 329 F. 2d 223 (1963), cert. denied, 375 U. S. 941, 84 S. Ct. 346, 11 L. Ed. 2d 272 (1964); Chicago Automobile Trade Association v. Madden, 328 F. 2d 766, 769 (7th Cir.), cert. denied, 377 U. S. 979, 84 S. Ct. 1885, 12 L. Ed. 2d 747 (1964)."

Bristol-Myers' naked allegations that the ALJ's ruling will deprive it of a fair hearing, or will result in an expensive and lengthy administrative hearing which may ultimately be set aside because of these rulings (Complaint ¶ SEVENTH), do not amount to a showing of irreparable injury and are clearly insufficient to warrant judicial intervention. E. g., Renegotiation Board v. Bannerkraft, 415 U.S. at 24; Bristol-Myers Company v. FTC, 469 F. 2d at 1118. Notwithstanding Bristol-Myers' characterization, the ALJ's rulings at issue here do not involve any deprivation of a constitutional right, and thus judicial intervention is inappropriate. Sperry and Hutchinson Company v. FTC, 256 F. Supp. 136, 143 (S.D.N.Y. 1966); see, e.g., Barnes v. Chatterton, 515 F. 2d 916 (3rd Cir. 1975); Sterling Drug, Inc. v. FTC, 450 F. 2d 698, 710-12 (D.C. Cir. 1971); Maremont Corp. v. FTC, 431 F. 2d 124, 127-28 (7th Cir. 1970). Moreover, it is settled that

"The mere expense and inconvenience of a prospective administrative hearing do not, without more, constitute irreparable injury. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52 (1938)."

Niagara Mohawk Power Corp. v. F.P.C., Docket No. 75-4263, slip op. 5063, 5070 (2d Cir. July 19, 1976).

Consideration of the terms of the ALJ's rulings of which Bristol-Myers complains perhaps best demonstrates

the prematurity of Bristol-Myers' request for judicial intervention here. In its order dated March 23, 1976, the ALJ stated that Bristol-Myers

"will be free to ascertain from individual witnesses at the interview the information they now seek through subpoenas, and to move for appropriate relief should any case of improper influence come to light." Exh. B to the Corsi affidavit. (Emphasis added.)

In its order of April 20, 1976, the ALJ reaffirmed that position, and indeed, expressed awareness of questions regarding due process:

"It is my intention to accord respondent all due process consistent with the requirements of an expeditious hearing. In my view, the procedure outlined in my March 23, 1976 order is adequate to safeguard respondent's due process rights with respect to pretrial discovery regarding anticipated testimony of complaint counsel's expert witnesses, including respondent's right to interview complaint counsel's prospective expert witnesses... In these circumstances, to expend valuable trial preparation time in collateral proceedings of this type in the name of due process would be carrying a good thing too far and is unwarranted." Exhibit C to the Corsi affidavit.

Given the clear and unambiguous statements in the ALJ's orders that these orders are subject to modification should that appear necessary as a result of information developed during prehearing discovery, the issues raised here may very well become moot, and thus, this action should be dismissed as premature. See Maremont Corp. v. FTC, 431 F.2d at 126-123.

In sum, this action should be dismissed for Bristol-Myers' patent failure to exhaust administrative remedies; indeed, this action appears to be little more than a further attempt by Bristol-Myers "to prolong the administrative proceedings through efforts to obtain premature judicial review." Bristol-Myers Company v. FTC, 469 F.2d at 1119.*

POINT II

BRISTOL-MYERS IS NOT ENTITLED
TO THE RELIEF IT HAS REQUESTED
AND THE COMPLAINT SHOULD BE
DISMISSED.

Even assuming that the Court may properly reach the merits here, it is nonetheless clear that this action must be dismissed for failure to state a claim upon which relief may be granted.

* We note that there are additional jurisdictional impediments in this case. First, it is submitted that Bristol-Myers has not met the \$10,000 requirement in 28 U.S.C. §1331. The only monetary damages Bristol-Myers alleges is that which would result if the administrative trial were later set aside as a result of a subsequent finding that the ALJ's rulings regarding the issue in this suit deprived Bristol-Myers of a fair hearing. Built as it is on a series of unsupported assumptions, including the assumption that the ALJ will not grant appropriate relief if and when Bristol-Myers substantiates its "suspicion" of improper conduct, the alleged damages can only be characterized as hypothetical and speculative, thereby not meeting the requirement of 1331. See Rosado v. Wyman, 414 F.2d 170, 176 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 397 (1970). Second, the APA is not an independent grant of jurisdiction. See Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973); 13 Wright, Miller & Cooper, Federal Practice & Procedure §3568 at 465-67 (1975). Third, 28 U.S.C. §1337 is not a proper basis of jurisdiction because Bristol-Myers' claim -- that it is entitled to certain discovery tools -- does not arise under an act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. See Atlantic Richfield Company v. FTC, 398 F. Supp. 1, 7 (S.D. Tex 1975).

The ALJ concluded that having merely presented a "suspicion" of improper conduct by complaint counsel, and having thus far "utterly failed" to justify an on-the-record inquisition, Bristol-Myers was not entitled at this time to the issuance of subpoenae requiring complaint counsel to testify and produce documents, or to conduct ex parte interviews with expert witnesses. (Exhibits B and C to the Corsi Affidavit.) Rather, the ALJ ruled that Bristol-Myers must first substantiate its "suspicion" during the course of prehearing interviews and depositions of expert witnesses, and then, should evidence of improper conduct emerge, apply to the ALJ for appropriate relief. (Exhibit D to the Corsi affidavit.) Proceeding in this manner, the ALJ concluded, would adequately protect Bristol-Myers' due process rights consistent with the requirements of an expeditious hearing. (Id.)

Clearly, this ruling by the ALJ is reasonable and well within the bounds of "the quasi-judicial discretion" with which an administrative agency is vested in such discovery matters. Independent Directory Corp. v. FTC, 183 F.2d 468, 471 (2d Cir. 1951); E.B. Miller & Co. v. FTC, 142 F.2d 511, 519-20 (6th Cir. 1944). See 1 R. Davis, Administrative Law Treatise, §8.15, p. 586 n.12 (1958).

Indeed, as the Court in Maremont Corp.

v. FTC, 431 F.2d at 129, stated in a related context:

"Plaintiff has failed to make any allegation from which we may conclude that the hearing examiner has acted arbitrarily and capriciously to the point of ignoring plaintiff's rights. Rather, the hearing examiner has weighed the considerations on both sides and decided that Washington, D.C., is a convenient place for the hearings at least until the close of the government's evidence. Under such circumstances, we conclude that the district court did not have jurisdiction to review the examiner's order."

Here, too, the Court should dismiss plaintiff's action for failure to state a claim upon which relief may be granted.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Dated: New York, New York

August 20, 1976.

LCC:mr
n-2509

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendants.

LOUIS G. CORSI
Assistant United States Attorney

WILLIAM A. HORNE
Office of General Counsel,
Federal Trade Commission

- Of Counsel -

Plaintiff's Memorandum in Opposition to
Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

BRISTOL-MYERS COMPANY,

Plaintiff,

-against-

76 CIV 2556 (CMM)

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

- - - - - x

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
UNDER RULE 12(b)(1) AND 12(b)(6)

-récis

The essential facts are presented in Gerald
Guttman's affidavit of September 3, 1976 (Guttman). The
theory of plaintiff's case, which will next be detailed, is:

A. Plaintiff (the respondent in an administrative
trial before the defendants, in which they stand as
complainants) has the right, even of a constitutional
stature, to have its lawyers interview defendants'
administrative proceeding witnesses without defendants'
counsel being present, unless the witnesses are
themselves unwilling.

B. Incident thereto, plaintiff has the further
right that defendants' counsel not exercise influence
upon such witnesses calculated or effective to inhibit
their volition to grant such interviews.

C. There is substantial evidence that defendants' counsel probably have exercised such influence and thereby caused witnesses to refuse requests by plaintiff's counsel for ex parte interviews.

D. In order to protect its rights fully plaintiff should, therefore, be allowed to pursue immediate discovery into the manner and extent of impingement by defendants' counsel upon such rights, so that an appropriate and adequate remedy may be timely fashioned.

Defendants' motion is to dismiss the complaint under Rules 12(b)(1) and 12(b)(6); which, of course, admits for its purposes all matters well pleaded in the complaint.

Defendants, in effect, deny each of the above-summarized elements of plaintiff's case. They assert (insofar as subparagraphs A and B above are concerned) that there is no cognizable cause of action and no subject-matter jurisdiction in this Court; that mere "naked suspicion" is all plaintiff possesses as the basis of subparagraph C; and--relative to subparagraph D--that plaintiff has not exhausted its administrative remedies, will have adequate relief, if such is needed, by ultimate review of a cease and desist order in a court of appeals, and is foreclosed from earlier judicial review by 5 U.S.C. § 704 and certain decisions they cite.

Plaintiff's refutations of these contentions will be, in passim:

1. That its substantive rights (subparagraphs A and B above) are firmly

established by such controlling authorities as I.B.M. v. Edelstein, 526 F.2d 37 (2nd Cir. 1975) and Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966).

2. That its "suspicion" is not without impressive basis, or even some actual proof; sufficient, at the least, to warrant the further looking into via discovery that plaintiff seeks by its complaint herein.

3. That plaintiff has left no stone unturned to secure protection and enforcement of its rights at the administrative level, and has met with nothing but obdurate rejection; the administrative law judge's (ALJ) purported reservations of opportunity for plaintiff to renew its requests in the light of possible future eventualities are wholly illusory and inadequate.

4. That deferred judicial review cannot provide plaintiff with an adequate remedy, and neither 5 U.S.C. § 704 nor judicial precedent bars plaintiff from having immediate review in this Court under the doctrines of Abbott Laboratories v. Gardner, 387 U.S. 136

(1967); Gardner v. Toilet Goods Association,
387 U.S. 167 (1967); Dunlop v. Bachowski,
421 U.S. 560 (1975); I.B.M. v. Edelstein,
526 F.2d 37 (2nd Cir. 1975); Fay v. Douds,
172 F.2d 720 (2nd Cir. 1949);
The Coca-Cola Company v. FTC, 475 F.2d 299
(5th Cir. 1973).

I

PLAINTIFF'S DUE PROCESS RIGHTS
ARE AT STAKE

The court of appeals for this circuit recently has cautioned against restrictions which may impede the development, presentation and determination of facts - particularly at the comparative outset of a trial - and has held such restrictions to be an infringement of one's constitutional rights, I.B.M. v. Edelstein, supra.

[R]estrictions on interviewing ... not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made.

526 F.2d at 42.

Witnesses are the property of neither party to a legal proceeding. All parties have an equal right, and should have an equal opportunity, to interview them.

There is nothing in the law that gives counsel for one party the right to interfere with the preparation of the other party's case by effectively denying opposing counsel access to a witness except in his presence. Even one counsel's mere "advising" of witnesses "that they not speak to anyone about the case unless [he were] present" results in such interference, Gregory v. U.S., 369 F.2d 185 (D.C. Cir. 1966), quoted and relied upon in I.B.M. at pages 43-44. That is true whether the case is criminal, Gregory, or civil, I.B.M., in nature. For in each the trial is a quest for the truth. Naturally, "[t]hat quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined." Gregory at 188. Any suppression of the means by which one party could obtain evidence deprives that party of a fair trial. Id. at 189. Such a conclusion was supported "wholeheartedly" in the second circuit by I.B.M. Accord, Coppolino v. Helpern, 266 F. Supp. 930 (S.D.N.Y. 1967).

The quotation from Maremont Corp. v. FTC, reproduced on the last page of defendants' memorandum, is taken so far out of context as to defy any logical connection with the proposition for which it is cited or with the facts and issues before this Court.

The quoted language, found in the section of that

opinion entitled VENUE, dealt with the hearing examiner's decision to hold hearings in Washington, D.C. instead of Chicago, Illinois. After considering the convenience and necessities of both parties he had concluded that the hearings would proceed with far more expedition, and would cause much less overall inconvenience, if they were held in Washington, D.C. He even went so far as to reconsider the venue issue at the end of the government's case-in-chief; whence comes defendants' quotation concerning a hearing examiner's discretion and the failure of a litigant to show actions that were arbitrary and capricious.

Here the alleged wrong is of a different and far more serious kind and degree, namely a denial of plaintiff's due process right to adequate representation by counsel and to a fair trial. This does not lie within agency discretion.

Other portions of Maremont are almost equally inapposite to the within action. There the hearing examiner's rulings on discovery were not intended to, and did not, foreclose further relief to Maremont if a subsequent showing entitling it to such relief could be made, 4 F.2d at 126. Here the Commission has finally refused plaintiff's requests, Order of May 25, 1976, Exhibit E to moving affidavit. The ALJ's purported reservation of plaintiff's due process rights completely fails to accomplish that objective. As discussed at pages 14-15 of plaintiff's

Petition For Discretionary Review By The Commission:

He recommended that the interviews with prospective witnesses be held to completion ["... Under the circumstances of this case there is no need to subject complaint counsel's expert witnesses to repeated interviews by respondents' counsel." (Order dated April 5, 1976.)] in complaint counsel's presence and that if any improper influence comes to light, appropriate relief might then be sought. ["... respondents will be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas, and to move for appropriate relief should any case of improper influence come to light." (Order of March 23, 1976.)] That, however, will not remove the prejudicial effect of complaint counsel's presence during the entire interview or preserve respondent's basic rights.

Thus, even though respondent were to develop that except for complaint counsel's intervention the witness would have been willing to see respondent's counsel ex parte, respondent would nonetheless be compelled to continue his interview as to the merits of the proceeding, sacrificing the secrecy of its planning strategies and work product to complaint counsel who would remain present, or respondent would have to forego and abandon its right to go into the substantive aspects of the witness' testimony in view of the ALJ's provision precluding more than one interview session.

In Maremont there was no demonstrated relevancy to the administrative proceeding of the documents as to which discovery was denied nor was there a showing that the documents in issue would be placed into evidence, 431 F.2d at 127. Here the discovery sought concerns witnesses who have been designated on the Commission's own witness list as experts (Guttman, ¶4 and Exhibit XIII thereto).

The requested subpoenas in Independent Directory Corp. (Def. Mem. page 13) were found to be little more than one element in an overall attempt to demonstrate an irrelevant fact. Beyond that, they were considered to be unreasonably broad and thus properly denied on substantive grounds. Defendants' reliance on that case to illustrate a hearing examiner's "quasi-judicial discretion" in denying discovery subpoenas may be fine in the abstract, but has little relation to the facts of the within action or motion. The authorities cited by plaintiff to demonstrate its absolute right to ex parte interviews of willing witnesses and, a fortiori, to discover into the possible denial of that right, show that it is not attempting to demonstrate an irrelevant fact.

Defendants' reliance on E.B. Miller Co. (Def. Mem. page 13) is yet further afield. There the Commission issued the requested subpoena, providing petitioners with all the information to which they were entitled. It simply refused to require a third party to disclose its complete list of customers and the sources of its operating capital, matters considered highly confidential as well as irrelevant to the proceeding.

II

PLAINTIFF'S "SUSPICION"
IS NOT WITHOUT IMPRESSIVE BASIS

[W]e think it is really our right to be present at any of these meetings ... and, in fact, in those situations where the witness has not asked us to be present, we have suggested that one of us be present at such meetings ... and [it] is our right to be present.¹ (See, transcript of pre-hearing conference held on March 3, 1975 (Tr.), Exhibit A to moving affidavit, pages 385- 86.)

It is clearly inferrable from that statement and others like it that complaint counsel have adopted a firm, official position, and, as it develops, an unyielding one regarding the non-existence of a right in plaintiff to have its counsel conduct ex parte interviews with willing witnesses of complaint counsel.

1. Complaint counsel confuse the taking of a deposition with the conducting of an interview (Tr. 386). Often, it is based upon the interview--conducted outside of adverse counsel's presence--that a lawyer decides what questions he will pose or not pose to the witness during the deposition, or at trial.

As pointed out by I.B.M., in response to a similar contention made by government counsel,

In contrast to the pre-trial interview with prospective witnesses, a deposition serves an entirely different purpose, which is to perpetuate testimony, to have it available for use or confrontation at the trial, or to have the witness committed to a specific representation of such facts as he might present. A desire to depose formally would arise normally after preliminary interviews might have caused counsel to decide to take a deposition.

I.B.M. at page 41, n. 4.

At the same prehearing conference where complaint counsel made their feelings known, the administrative law judge ruled that where a Commission expert witness specifically desired complaint counsel's presence they could attend. He also gave complaint counsel permission to communicate that as his ruling to their witnesses.

The authority given to complaint counsel to cite the law judge's ruling to their prospective witnesses itself created a grave risk of infringing upon plaintiff's rights. That danger was pointed out by plaintiff's counsel and acknowledged by the ALJ (Guttman, ¶¶ 9 and 10). Nevertheless, the ruling stood; the complaint counsel-witness communications were permitted; and they took place (Tr., pp. 390-91; Guttman, ¶ 11).

A letter from one of the witnesses, Dr. Menguy, (Guttman, ¶ 17) makes suspect, to say the least, complaint counsel's representation that "the witnesses have, for the most part, already contacted us and said they have received a letter from Mr. Weil who wants to set up a meeting ... and they then say, we would like you to be there, without our suggesting the point" (Tr., pp. 390-91). That letter states, in part,

[Complaint counsel] has advised me that I may grant you this interview provided that one of the Federal Trade Commission's attorneys be present. May I suggest that you coordinate this interview with the aforementioned proviso in mind (emphasis added).

Complaint counsel's contention, then and now, that plaintiff's requests are based on naked suspicions is betrayed by their own actions. Complaint counsel have stated on the record that they believe it to be their right to attend all interviews. In some as yet unknown, uncontrolled and unreviewed fashion they have communicated to their witnesses that the ALJ has ruled that the witnesses may elect to have complaint counsel present at the interviews. At least one witness, Dr. Menguy, has perceived such presence to be a condition precedent imposed by the government upon granting an interview. Naked suspicion? We think not. More than enough exists to justify plaintiff's quest for the opportunity to find out what really happened in connection with complaint counsel's efforts to effectuate what they so strongly--albeit mistakenly--believed to be there "right to be present at any of these meetings" (Tr., pp. 385-86).

Plaintiff need not show, and this Court need not decide, whether such interference actually occurred. The relief presently sought is merely to be allowed discovery to dig out as specifically as possible, before memories stale and records drop out of sight, just what complaint counsel did communicate to the witnesses; and, based on that, the extent to which plaintiff's rights have been violated, and what can timely be done to remedy the situation.

III

THIS COURT HAS JURISDICTION AND SHOULD EXERCISE IMMEDIATE REVIEW

Plaintiff has availed itself of every conceivable opportunity before the Commission in attempting to assure itself the right to adequate preparation of its case and to a fair trial. It cannot seriously be contended that all administrative remedies have not been exhausted (Guttman, generally, especially ¶19).

Unfortunately, plaintiff's attempts before the Commission have not succeeded in lifting the restrictions placed on it with regard to discovering into the reasons behind the denial of ex parte interviews by certain prospective witnesses. Plaintiff has a fundamental right to talk to any prospective witness in the absence of complaint counsel if the witness is agreeable to it. Any persuasion, advice or instruction by complaint counsel to the contrary or any exerted influence by them to change what would have been a witness's own volition to grant an ex parte interview infringes upon that right. (Supra, Point I.)

More than a quarter century ago this circuit held that district courts need not await final action before reviewing disputes engendered by the conduct of administrative proceedings where there is an "assertion of a constitutional right ... not transparently frivolous", Fay

v. Douds, 172 F.2d 720 (2nd Cir. 1949). Other circuits have come into accord with that doctrine, The Coca-Cola Company v. FTC, 475 F.2d 299, 303 (5th Cir. 1973); The Seven-Up Company v. FTC, 478 F.2d 755, 757 (8th Cir. 1973); Miami Newspaper Printing Pressman's Union Local v. McCulloch, 322 F.2d 993, 996 (D.C. Cir. 1963).

By this circuit's court of appeals' own characterization, facts parallel to those alleged in the complaint herein describe the violation of a constitutional right, I.B.M., 526 F.2d at 42. See also, Coppolino v. Helpern, 266 F. Supp. 930 (S.D.N.Y. 1967). At least one other circuit similarly has so held, Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966):

Here the defendant was denied that opportunity which ... elemental fairness and due process required that he have.

Id. at 188.

As has been demonstrated, plaintiff has substantial reason to believe 2/ that the identical constitutional right protected in I.B.M., Gregory and Coppolino may have been infringed in its proceeding before the Commission. Certainly, if this Court has jurisdiction to vindicate the right itself, it must also have jurisdiction to order inquiry into the preliminary question of whether, and to what extent,

2. Supra, at pages 9-11.

the right has been infringed. Fay v. Douds, supra at 723; Coca-Cola, supra at 303. That is what this Court is being asked to do at this time. It is of little consequence to plaintiff whether the discovery process necessary to that end be conducted at the administrative level pursuant to this Court's mandate, as sought in the complaint, or whether it be done via Rules 26 et seq. as a part of the within action, as part of the process to determine the full scope of relief appropriate herein.

In no event should this case be dismissed, however, for "there is [by] now virtually a presumption in favor of review, which makes review the rule and nonreviewability an exception which must be demonstrated", Schwartz, "Administrative Law Cases During 1975", 28 Admin. L. Rev. 131, 143 (Spring 1976).3/

The guiding principles concerning reviewability derive from the Supreme Court's 1967 Abbott Laboratories trilogy.4/ There the Supreme Court made it clear that requests for judicial relief shall be given "hospitable" treatment.

3. See Dunlop v. Bachowski, 421 U.S. 560 (1975) as an illustration of the strong policy of the law in favor of judicial review.

4. Abbott Laboratories v. Gardner, 387 U.S. 136; Toilet Goods Association v. Gardner, 387 U.S. 158; Gardner v. Toilet Goods Association, 387 U.S. 167.

... the Administrative Procedure Act ... embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L. Ed. 868; see United States v. Interstate Commerce Comm'n, 337 U.S. 426, 433-435, 69 S. Ct. 1410, 1414-1415, 93 L. Ed. 1451; Brownell v. We Shung, supra; Heikkila v. Barber, supra. Again in Rusk v. Cort, supra, 369 U.S. at 379-380, 82 S. Ct. at 794, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. See also, Jaffe, Judicial Control of Administrative Action 336-359 (1965).

Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967) (footnote omitted); to same effect, Gardner v. Toilet Goods Association, 387 U.S. 167 (1967). Cf., Toilet Goods Association v. Gardner, 387 U.S. 158 (1967).

As the Supreme Court stated in McKart v. United States, 395 U.S. 185, 193 (1967):

The doctrine [exhaustion of administrative remedy] is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions see e.g., Layton & Fine, The Draft and Exhaustion of Administrative Remedies, 56 Geo. L.J. 315, 322-331 (1967). Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.^{5/}

Cases involving the Commission specifically amply illustrate this, following the doctrine of such cases as Leedom v. Kyne, 358 U.S. 184 (1958); Boire v. Greyhound Corp., 376 U.S. 473 (1963); Oestereich v. Selective Service System Local Board No. 16, 393 U.S. 460 (1970).

Thus in B.F. Goodrich Co. v. FTC, 208 F.2d 829 (D.C. Cir. 1953), appeal after remand 242 F.2d 31 (1957), the court reversed judgments of the district court dismissing, for lack of jurisdiction, actions to enjoin the Commission from enforcing a rule promulgated by it under the Robinson-Patman Act. The court of appeals stated:

5. McKart is itself an exception, holding that a Selective Service draftee's "failure to utilize a particular administrative process - an appeal - [does not ban] him from defending a criminal prosecution on grounds which could have been raised on that appeal." (395 U.S. at 197.)

Our problems are whether the District Court had jurisdiction and whether the complaints stated a claim upon which relief could be granted. Those problems boil down to whether the complaints allege the sort of damage which will support injunctive relief against an administrative regulatory order.

208 F.2d at 832.
(footnote omitted).

and

We think the proper disposition of the cases under the circumstances is to remand them all with directions to the District Court to entertain them as an initial step, and if upon hearing it develops that some of the plaintiffs are not actually threatened with damage by way of disruption of business, those complaints can be dismissed.

208 F.2d at 834.

In a 1964 decision by this Court, Union Bag-Camp Paper Corporation v. FTC, 233 F. Supp. 660 (S.D.N.Y. 1964), Judge Cooper accepted jurisdiction to determine whether the plaintiff was entitled to have the Commission obtain, for plaintiff's benefit, certain special reports pursuant to FTCA §6(b), 15 U.S.C. §46(b).6/

6. The court dismissed the complaint on its merits on the ground that plaintiff had no such statutory right where section 6(b) orders are concerned. Here, of course, plaintiff is relying upon the constitutionally and otherwise based rights defined in I.B.M. and Gregory.

Judge Cooper stated, "If we are satisfied that the Commission has violated a statutory mandate here, we will not require plaintiff to wait until it is ordered to cease and desist from violating Section 7 of the Clayton Act before obtaining redress." 233 F. Supp. at p. 663. He went on to state, "Plaintiff is claiming that the agency action was in direct derogation of the alleged statutory command to supply it with 6(b) reports. Clearly, the instant action falls within the ambit of both Leedom and Boire as one involving the interpretation and construction of a statute." (At p. 663.)

In Elmo Division of Drive-X Co., Inc. v. Dixon, FTC, 348 F.2d 342 (D.C. Cir. 1965) the court reversed a district court holding that it lacked jurisdiction to stop the Commission from proceeding upon an administrative complaint where, according to plaintiffs, the existence of an earlier consent decree required the Commission to proceed, instead, by way of reopening the earlier case. Pertinently, the court wrote:

Were this an action between private parties, appellant would be hard pressed to demonstrate absence of an adequate remedy at law and this would ordinarily render specific relief inappropriate. Here, however, the injury which appellant asserts is one for which any adequate legal remedy is very remote.*** The gist of appellant's complaint is ... that the Commission may not institute any complaint proceeding against it in relation to matters

covered by the consent order until the necessary preliminary findings have been made at a reopening hearing reviewable by a Court of Appeals. Given the nature of the injury claimed, an appellate court reviewing an order resulting from the new complaint proceeding can afford appellant no meaningful remedy.

348 F.2d at 347 (footnotes omitted).

The selective holdings of the Court of Appeals for the Seventh Circuit in Jewel Companies Inc. v. FTC, 432 F.2d 1155 (1970) are highly illuminating. It held that the court should not intervene before final agency decision to determine (1) whether the agency complaint was adequate as a matter of law, and (2) whether the discretion of the Commission was properly exercised in issuing its administrative complaint, and (3) whether the Commission's action would be an infringement on the jurisdiction of the Secretary of Agriculture under 7 U.S.C. §§ 499(a) et seq. By contrast however, the court did hold that jurisdiction existed to review immediately an asserted misunderstanding by one of the commissioners (whose vote was determinative to issuance of the Commission's complaint) as to the construction of the Commission's obligation of enforcement under sections 2(c) and 11 of the Clayton Act, 15 U.S.C. §§13(c) and 21. The court stated:

The question raised is inherently a legal one and does not involve any factual determinations ... Since the question is one of statutory construction as to the authority of a Commissioner in voting for the issuance

of a complaint for violation of Robinson-Patman and does not involve any substantive determination by the Commission, the Commission's reliance upon Myers v. Bethlehem Shipbuilding, supra, is misplaced.*** The legal obligation of a Commissioner can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an agency's final order.

432 F.2d at 1159,
(footnote omitted).

Illustrations of interlocutory judicial intervention despite purportedly exclusive appellate procedures under the National Labor Relations Act are found in Farmer v. United Electrical, Radio Machine Workers of America (UE), 211 F.2d 36 (D.C. Cir. 1953) and Miami Newspaper Printing Pressman's Union Local v. McCulloch, 322 F.2d 903 (D.C. Cir. 1963).

The questions pivotal here, then, as distilled from the pertinent authorities are:

1. Is plaintiff suffering legal wrong or being adversely affected or aggrieved by action of the defendants?
2. Is such action final?
3. Does any statute preclude this Court from giving plaintiff the relief it seeks?
4. Does plaintiff have other adequate remedy in a court for defendants' said action?

Plaintiff's aggrievedness, as a matter of law 7/ and constitutionality 8/, is firmly established by application of I.B. and Gregory (supra, pages 4-5) to the indisputable facts herein.

Similarly, there can be no doubt, upon the uncontroverted facts herein, that (a) defendants' denial of the discovery plaintiff sought of them was a denial of relief, hence, "agency action" within the definition of 5 U.S.C. §551(13), 9/ and (b) that it was final (Guttman, ¶19).

Neither 5 U.S.C. §704 nor any other statute "precludes such relief" (Abbott, supra, p.14-15) as the plaintiff seeks from this Court. Defendants rely upon the sentence in section 704 that reads, "a preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the

7. "... we believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: ..."
Abbott Laboratories at 149.

8. "Where ... parties bring suit in District Court alleging the deprivation of specific constitutional rights ... the District Court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in a given procedural setting, and if so, whether such rights have been infringed and how they ought to be redressed." The Coca-Cola Company at 303.

9. "'agency action' includes the whole or a part of ... agency ... relief ... or denial thereof, or failure to act."

final agency action." This provision does not, however, undertake to declare what preliminary, procedural or intermediate agency actions or rulings are or are not directly reviewable; and it certainly does not mandate that preliminary, procedural or intermediate agency actions or rulings as such shall not be directly reviewed.^{10/} Yet that is the construction that would be necessary to support the defendants' position.

Thus, there is left only the question of whether plaintiff has "other adequate remedy in a court" for the action of the defendants complained of herein (5 U.S.C. §704). The answer to that depends, of course, upon the adequacy of relief that would be obtainable if deferred to an appeal under 15 U.S.C. § 45(c) from a final cease and desist order in the administrative proceeding at issue.

Such adequacy would require -

1) that even if the cease and desist order were properly founded in every other respect, a court of appeals would nonetheless set it aside upon the sole ground of defendants' action complained of herein; and

10. As Abbott pointed out, citing Rusk v. Cort, "Only upon a showing of the 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" (supra, page 15).

Rather than being restrictive, section 704 is a safeguard against any prejudicial agency action escaping judicial review entirely.

2) that, upon the consequent remand and rehearing before the Commission, measures could be applied which would give the plaintiff relief as adequate as that which can now be granted by this Court.

Any allowance for reality must dictate that neither of these essentials can be assuredly anticipated.

The administrative proceeding poses approximately 100 issues of fact, many of them involving complex matters of biochemistry, pharmacology, and of consumer perception, behavior and psychology (Guttman, Exhibit XI). It also raises approximately 20 issues of law, including those of serious and, so far, first impression under the newly enacted Magnuson-Moss Warranty--Federal Trade Commission Improvement Act of 1975, and under the first amendment's guarantee of free speech (Guttman, Exhibit XI). Complaint counsel's listing sets forth a minimum of 65 persons they intend to call as witnesses, 30 of which at least are to present expert testimony (Guttman, Exhibit XIII). Complaint counsel also identify 706 documentary exhibits to be put into evidence in the course of the administrative hearings (Guttman, Exhibit XII). There is no predicting at this point how extensive the defenses of the three administrative-respondents will be.

Any remaining doubt as to the voluminous magnitude, the considerable complexity, and the prolonged duration of the Commission's proceeding, and of the scope of a court of appeals' task in reviewing it, would be dispelled by complaint counsel's brief (Guttman, Exhibit XIV).

While ideally, and possibly theoretically, all of this should not interfere with plaintiff's receiving at the hands of an appellate court total consideration of every point advanced by it, merely the mechanical limitations upon the length of its brief and the time for its oral argument must severely circumscribe its ability to present its case on the matters involved here to the court of appeals, in conjunction with the panorama of all of its other arguments, with anywhere near the completeness available to it in this action; and surely a court of appeals, with all the other issues concurrently presented to it, cannot be expected to allocate time or concentration, as this Court can, upon the discrete matter here involved. Even if it could do so, there would be far more by way of inhibitory influences upon it than exist here against granting plaintiff relief at the expense of upsetting a cease and desist order at that late date.

But suppose a court of appeals would, despite all that, vacate a cease and desist order on the ground that plaintiff has been aggrieved and adversely affected in the manner set forth herein. What remedy could be offered, and how could it be adequate?

At that stage there would not have been evidence before the court of appeals upon which it could finally determine whether the Commission had, in fact, so intervened with the witnesses as to deprive plaintiff of ex parte interviews it would otherwise have obtained. The most the court of appeals could do would be to order the Commission to then grant plaintiff the discovery it seeks now. But by that time the memories of deponents will have weakened (in this matter the detailed manner and content of oral communications between complaint counsel and their witnesses are quite important), some of them may have become unlocatable (the complaint counsel whose statements appear in the transcript attached to the moving affidavit, Ms. McCoy, has already left the Commission), and pertinent records and memoranda may have become misplaced, lost or destroyed.

Of further crucial importance, witnesses who might at this stage be willing to grant plaintiff's counsel a private interview can certainly be expected to change their attitude after they have been through the ordeal of testifying and of having been cross-examined by those very counsel. Neither the court, nor even the Commission itself,

would seem to be empowered to compel such witnesses to subject themselves to the ex parte interviews, and surely neither could command the type of cooperation and openness from them that plaintiff's counsel may be able to enjoy at this time.

I.B.M. provides an instructive analog. It got to the court of appeals by a petition for relief in the form of a writ of mandamus, 28 U.S.C. § 1651 and Fed.R.App. Proc. 21. One of the issues presented, and the first one discussed by the court, was whether a party has a right privately to interview an adverse witness. It is virtually the same issue underlying the within action and this motion. The court of appeals granted the petition.

By permitting that extraordinary procedure,¹¹/ the court recognized not only the importance of ex parte interviews, but as well the essentiality of not deferring until after a final judgment review of the district court's intermediate order prohibiting such interviews of government witnesses by defending counsel.

11. "Mandamus, of course, is an extraordinary remedy", requiring "unique and exceptional circumstances", Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76, 78 (2nd Cir. 1974). "Mandamus is only available in extraordinary cases" and the court "must determine whether any error of the district court is of sufficient magnitude to justify the issuance of mandamus", U.S.v. Lasker, 481 F.2d 229, 232 (2nd Cir. 1973).

The Second Circuit's granting a petition for a writ of mandamus to review immediately the right to conduct ex parte interviews is testimony of the highest order that it considers the denial of that right an irreparable injury. Its acknowledgement that subsequent review won't correct such a denial demonstrates that expedited judicial attention is called for.

The cases cited by defendants at page 9 of their memorandum do not support their position. Sterling Drug, Inc. v. Weinberger dealt with res judicata, not exhaustion. It did however, state that an injunction may issue against an administrative agency if an agency continues a proceeding "that is being conducted in a manner that cannot result in a valid order", (at page 1239) citing Pepsico, Inc. v. FTC.

Renegotiation Board v. Bannerkraft Clothing Co., Inc. concerned the jurisdiction of a federal district court to enjoin the renegotiation process until a claim under the Freedom of Information Act was resolved. In answering that narrow question the court said:

We find it unnecessary, however, to decide in these [consolidated] cases, whether, or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin agency action pending the resolution of an asserted FOIA claim. We hold only that in a renegotiation case the contractor is obliged to pursue its administrative remedy and, when it fails to do

so, may not attain its ends through the route of judicial interference. The nature of the renegotiation process mandates this result....

415 U.S. at 26. (Emphasis in original.)

In the final analysis the Court found a lack of Congressional intent to permit the Freedom of Information Act to preempt the Renegotiation Act, since under the latter, a contractor may institute a de novo proceeding in the Court of Claims, not bound by any prior Renegotiation Board determination, and will have the usual rights of discovery available to it at that time.

All the cases cited by defendants at page 10 of their memorandum to support their statement that "notwithstanding Bristol-Myers' characterization, the ALJ's rulings at issue here do not involve any deprivation of a constitutional right, and thus judicial intervention is inappropriate" were decided before I.B.M. and must be discounted on that ground alone. Nonetheless, the court in Sperry & Hutchinson recognized the immediate reviewability of agency action that violates a constitutional right, 256 F. Supp. at 140 and 141, and decided that the requested discovery could and, by judicial instruction, would be made available at a later stage of the proceeding.

But here, if plaintiff is denied its requested discovery its opportunity to have it in a meaningful way is forever gone.

Sterling Drug v. FTC likewise recognized the immediate reviewability of the violation of a constitutional right, page 710, although it did not find one there. Beyond that, the Sterling Drug court did not consider the issue before it a purely legal one, as it is here, and deferred decision until it could be provided with complete facts, i.e. after the administrative proceeding.

Barnes v. Chatterton too recognized the reviewability of a violation of a constitutional right, but did not find such a situation before it because the requested documents were determined by the Examiner to be irrelevant. Such is not, and could not be, the case here where the discovery is plainly relevant to plaintiff's constitutional and fundamental rights to its attorney's services and a fair trial. Indeed, defendants never have contended that plaintiff is requesting irrelevant discovery.

A major distinguishing characteristic between the cases cited by defendants and the instant situation lies in the difference between an asserted need to review certain documents, which may be equally accessible at a later date, and the need to determine the effect of certain communications, if made, on the thought and decision-making processes of individuals, which may not be determinable at a later date, see page 25, supra.

Defendants' reliance on the quotation from Niagara Mohawk Power Corp. v. FPC, citing Myers v. Bethlehem, is misplaced. Plaintiff has demonstrated that more is at stake than "mere expense and inconvenience", see page 4, supra, and Guttman, generally.

In the footnote on page 12 of their memorandum defendants glibly toss out certain jurisdictional issues. The contentions made, and the alleged authorities cited in support of them, are without merit.

Defendants state that plaintiff's allegation of the jurisdictional amount is based on "assumption" and "suspicion" and "can only be characterized as hypothetical and speculative" and "thereby [does not meet] the requirement of 1331". Plaintiff already has shown that its claim is based on more than suspicion, pages 9-11, supra; and certainly its right to a fair administrative trial, with all that is at stake there (Complaint in Docket 8917, pages 17-18, 20-24) involves hundredfolds of \$10,000.

Thus, defendants' citation to a class action suit brought by welfare recipients to enjoin enforcement of a section of the Social Services Law, Rosado v. Wyman, ignores the direct, potential damage to plaintiff that may result from the Commission's institution of its administrative proceeding and from denying plaintiff its due process rights. In Rosado the court found that "the monetary loss to each of the plaintiffs does not approach \$10,000", 304 F. Supp. at

1363; 414 F.2d at 176. By contrast, in the Commission proceeding against plaintiff the expenditure for the advertising in issue totals in the millions of dollars, while the proposed "corrective advertising" order has the potential of adding millions of dollars more. The \$10,000 jurisdictional amount is but a small fraction of the potentially direct damage to plaintiff.

Notwithstanding defendants' citation of Aguayo v. Richardson, which does include some unclear, puzzling language concerning the Administrative Procedure Act as an independent jurisdictional basis, there is the ruling by the United States Supreme Court, in Rusk v. Cort, stating:

The Administrative Procedure Act confers the right to judicial review of "any agency action".^{12/}

Indeed, Aguayo had to concede that "it is hard to see how else jurisdiction could have existed there ", 473 F.2d at 1102.^{13/}

12. 369 U.S. at 375. Note also the Abbott Laboratories pronouncement, supra at footnote 10.

13. While the Second Circuit apparently has not finally decided the question whether the Administrative Procedure Act independently confers jurisdiction for review of agency action, Greene County Planning Board v. FPC, 528 F.2d 38, 46 (2nd Cir. 1975), the majority of circuits have determined that it does. See, for example, Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973); Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); Sanders v. Weinberger, 522 F.2d 1167 (7th Cir. 1975); Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

In Atlantic Richfield Company v. FTC, the court specifically distinguished the suit brought there, to enjoin the enforcement of a subpoena, from one brought under FTCA section 5, 17 U.S.C. § 45, as is the one brought against plaintiff. At the same time the court wrote that the former does not provide a jurisdictional basis under 28 U.S.C. §1337, it pointed out that the latter does. The Atlantic Richfield decision actually supports plaintiff's allegation of jurisdiction under §1337 for another reason. It concluded that jurisdiction was proper under 28 U.S.C. §1331 although plaintiff only once, in its allegation of the amount in controversy, claimed that more than \$10,000 was involved. The court accepted the pleadings (as it must here, on defendants' Rule 12(b) motion) and, apparently, the view that federal question cases involving interpretation of the APA obviate the need for the presence of a jurisdictional amount when a review of agency action is involved, citing Rusk v. Cort.

Plaintiff has, as set forth in its complaint, given this Court a variety of valid jurisdictional bases. Beyond satisfying the lesser jurisdictional criteria of the Abbott Laboratories trilogy, it has demonstrated a potential violation of its constitutional rights, pages 4-7, supra.

Under either test the jurisdiction of this Court has been clearly shown.

CONCLUSION

Upon the foregoing, defendants' motion should
in all respects be denied.

Dated: New York, New York
September 10, 1976

Respectfully submitted,

WEIL, GUTTMAN & DAVIS

By Robert L. Sherman
Robert L. Sherman
Attorneys for Plaintiff
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

Of Counsel

Gilbert H. Weil
Robert L. Sherman

Affidavit of Gerald Guttman in Opposition
To Defendants' Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BRISTOL-MYERS COMPANY,

Plaintiff,

76 CIV 2556 (CMM)

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

AFFIDAVIT

Defendants.
-----X

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GERALD GUTTMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Weil, Guttman & Davis, attorneys for plaintiff herein, and I am personally familiar with the matters herein set forth.

2. This affidavit is submitted in opposition to defendants' motion, pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the action for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

3. On or about February 23, 1973, the Federal Trade Commission (Commission) issued an administrative complaint, FTC Docket Number 8917, against plaintiff and two other respondents, alleging that plaintiff falsely, deceptively and unfairly advertised three over-the-counter analgesic products (Bufferin, Excedrin and Excedrin P.M.) in violation of sections 5 and 12 of the Federal Trade Commission Act. On or about

May 2, 1973, plaintiff filed a timely answer to the complaint denying the essential allegations thereof.

4. On or about December 31, 1975, pursuant to the Administrative Law Judge's (ALJ) order, counsel for the Commission (sometimes complaint counsel), served plaintiff with their "Witness List", wherein they designated a minimum of 65 persons, including at least 30 experts, as prospective witnesses for the forthcoming adjudicative hearings.

5. To adequately prepare for trial, plaintiff's counsel contacted a number of the expert witnesses in order to obtain their voluntary cooperation in providing interviews to discuss their anticipated testimony. During those communications, a number of the witnesses advised plaintiff's counsel that they would be willing to be interviewed, but only if complaint counsel were present. It developed that, at least for some of these witnesses, their refusal to permit interviews in the absence of complaint counsel resulted from advice or instructions given them by counsel for the Commission, and that for many, if not most, of the others that may as well have been the situation.

6. In view of the comments received from the witnesses and the fact that complaint counsel apparently felt there was some impropriety in our efforts to seek ex parte interviews with their witnesses (as expressed in one of their filed papers), this matter was brought to the attention of the ALJ during a prehearing conference on March 3, 1976 (Tr., p. 384).^{*} In response to his question, complaint counsel

^{*} The pertinent portions of the transcript have been attached to the moving affidavit as Exhibit A.

stated ". . . we think it is really our right to be present at any of these meetings." (Tr., p. 385), adding:

"In many cases, the witness, in calling us, has asked to have us present, and, in fact, in those situations where the witness has not asked us to be present, we have suggested that one of us be present at such meetings. We think it is appropriate and is our right to be present at any meeting Respondent's counsel has with our witnesses." (Tr., pp. 385-386.) (Emphasis added.)

7. Plaintiff objected to complaint counsel's position since that is not complaint counsel's right. To the contrary, as our accompanying memorandum will show, it is plaintiff's clear, and even constitutional, right to meet ex parte with any willing prospective witness.

8. The ALJ, recognizing plaintiff's right to interview willing witnesses outside the presence of complaint counsel, ruled:

". . . the party calling that expert witness may be present at the interview of that witness by the other party provided that is a desire of that expert witness concerned, and Government counsel have my permission to communicate my ruling to your witnesses." (Tr., p. 388.) (Emphasis added.)

9. Plaintiff's counsel noted his opposition to the aforesaid ruling, in that the permission granted to complaint counsel went too far since any suggestion of the nature authorized by the ALJ, seemingly placing his authoritative weight on the side of complaint counsel's presence, would likely militate against a truly uninfluenced reaction by the witness to allow

an ex parte interview.

"Your Honor, just so that the record will be clear -- with regard to your previous ruling that Complaint Counsel could communicate your ruling to the prospective witnesses, I would like the record to note that does give me a problem because I think the mere fact they hear from Complaint Counsel with what Ms. McCoy has described as a 'suggestion', would itself be an inhibition upon them that maybe they better have them there and would influence and bias what might otherwise be their spontaneous approach and attitudes if they simply heard from me and I was requesting an interview. I think it might not occur to them to think I want Complaint Counsel there, but hearing from Complaint Counsel and maybe the tone of voice could very well alter what would have been their own individual approach."
(Tr., pp. 389-390.)

10. The ALJ acknowledged plaintiff's counsel's position, stating, "You have a point there, Mr. Weil" (Tr., pp. 390-391), but stood by his ruling nonetheless.

11. Upon information and belief, complaint counsel have cited the ALJ as authority for their communications to their expert witnesses, or certain of them.

12. In view of the aforesaid statements of complaint counsel on the record (supra, paragraph 6), and the very real likelihood that their communications in that vein to any of their witnesses have affected what would otherwise have been such witnesses' spontaneous willingness to allow ex parte interviews with plaintiff's counsel, plaintiff sought by application dated March 12, 1976, issuance of subpoenas ad testificandum and subpoenas duces tecum to complaint counsel in the instant case (Docket Number 8917), as well as complaint counsel in the two companion analgesic cases, American Home Products (Docket Number 8918) and

Sterling Drug, Inc. (Docket Number 8919),* emphasizing that the subpoenas were necessary to discover what impact complaint counsel may have had on their witnesses' decisions not to grant such interviews, and to develop from their letters, memoranda, or other records what actually transpired so that an informed determination could be made whether plaintiff's rights had been prejudiced. A copy of plaintiff's application is attached hereto as Exhibit I.

13. Complaint counsel responded on March 22, 1976 (copy attached hereto as Exhibit II) and, because of various faulty arguments contained therein, plaintiff sought permission to reply, by its application dated March 26, 1976.

14. Unknown to plaintiff, however, the ALJ had already issued an order dated March 23, 1976 (received March 29, 1976) denying the requested subpoenas. Two principal reasons were given (1) respondents had "shown no justification other than a mere suspicion that some witnesses may have been . . . [improperly] influenced", and (2) respondents would "be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas". A copy of said order is attached as Exhibit B to defendants' moving affidavit.

15. Because the aforesaid order was issued prior to receipt by the ALJ of plaintiff's reply, and since not all of the

* A number of the same witnesses are scheduled to testify in all three cases and complaint counsel in the two related cases may very likely confer with at least some of the witnesses in this case. In fact, three witnesses have indicated that they have already been contacted by complaint counsel in American Home (Docket Number 8918).

pertinent facts were before him at the time of his March 23, 1976 ruling, plaintiff sought reconsideration, by its motion dated April 1, 1976, attached hereto as Exhibit III. Plaintiff emphasized that it possessed very real evidence -- not just "mere suspicion" -- that complaint counsel unduly influenced and polluted the situation with a number of witnesses, and it offered to disclose such evidence to the ALJ in camera.^{*} Plaintiff alternatively requested that if the ALJ decided that the information regarding the question of undue influence should first be secured directly from the witnesses rather than from complaint counsel, such interviews should be held outside the presence of complaint counsel so that they could take place in a "shirt-sleeve" atmosphere where the witnesses could discuss the matter openly and be free to give spontaneous answers to all of counsel's questions, instead of in an environment where the witnesses might be reluctant to discuss the matter freely -- this being the only way to truly ascertain (before getting into the merits of the controversy) whether complaint counsel improperly influenced the witnesses not to grant ex parte interviews.

Complaint counsel responded on April 9, 1976 (copy attached hereto as Exhibit IV).

16. On April 5, 1976, without waiting to receive complaint counsel's opposing papers, the ALJ denied plaintiff's

^{*} Plaintiff's counsel did not want to disclose such evidence to Commission counsel prior to deposing them.

Plaintiff stands ready, of course, to make the in camera showing to this Court upon its request.

motion for reconsideration, ruling:

(1) "Respondents merely reiterate their suspicion . . . that complaint counsel improperly instructed the witnesses not to see respondents' counsel unless complaint counsel were present.", and (2) respondents' alternative request to have the interviews held without complaint counsel being present would subject the "witnesses to repeated interviews" and "needlessly prolong the pretrial proceedings".

Those rulings were made without so much as an allusion to plaintiff's assurance that it possessed concrete evidence to support its motion for reconsideration or to its proffer of such evidence in camera. The April 5, 1976 order is attached as Exhibit C to defendants' moving affidavit.

17. On April 9, 1976, complaint counsel moved to strike portions of plaintiff's April 1, 1976 application (supra, ¶15) on the alleged ground that it contained "scandalous references . . . to evidence of misconduct which respondents refuse to produce." A copy of said motion is attached hereto as Exhibit V.

Plaintiff replied on April 21, 1976, and, to show the hollowness of complaint counsel's argument, it attached as Exhibit 1 a letter from one of the witnesses, Dr. Menguy, -- as but one example of its evidence -- to make obvious that plaintiff's "suspicions" were not without substance. The letter* shows without question that the witness was influenced and conditioned in terms far exceeding even the ALJ's permission, which plaintiff

* Presumably in complaint counsel's possession as well; a copy had been sent to them by the witness.

maintains went too far (supra, pp. 3 and 4):

"... She [the Ms. McCoy of Tr., pp. 385-386, supra, p. 3] has advised me that I may grant you this interview provided that one of the Federal Trade Commission's attorneys be present. May I suggest that you coordinate this interview with the aforementioned proviso in mind." (Emphasis ours.)

In this response (copy as Exhibit VI hereto), plaintiff also again offered to disclose in camera to the ALJ all of the evidence it possessed concerning the prejudicial nature of complaint counsel's instructions.

Thus far, no decision has been rendered on complaint counsel's April 9, 1976 motion or on plaintiff's proffer of evidence in response to it.

18. By application dated April 15, 1976, plaintiff requested the ALJ, pursuant to section 3.23(b) of the Commission's Rules of Practice, to make a determination permitting an interlocutory appeal to the Commission from the orders of March 23, 1976 and April 5, 1976 denying issuance of the requested subpoenas. In that application, it was emphasized that certification was required since controlling questions of law and policy were involved, including the denial of due process, and that subsequent review would be an inadequate remedy. A copy of said application and a copy of complaint counsel's response thereto of April 20, 1976 are attached as Exhibits VII and VIII, respectively.

By order dated April 20, 1976, a copy of which is attached to defendants' moving affidavit as Exhibit D, the ALJ denied plaintiff's request to permit an interlocutory appeal. The denial was based principally on the ALJ's belief that "it was incumbent upon Bristol-Myers" to submit its evidence of complaint counsel's improper conduct to him, rather than to

offer it in camera, and that the procedure he outlined in the March 23, 1976 order would be "adequate to safeguard respondent's due process rights . . .".*

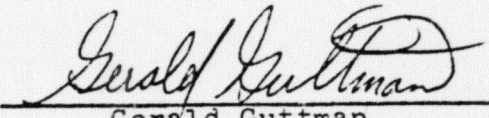
19. Even though the Commission's Rules of Practice do not provide for any further appeal, plaintiff, in order to exhaust all administrative remedies, sought by petition dated May 3, 1976 discretionary review by the Commission of the ALJ's orders of March 23, 1976, April 5, 1976 and April 20, 1976, on the grounds that they raised a very serious issue of a denial of due process resulting from the ALJ's error of law and abuse of discretion (discussed in our accompanying memorandum) in denying plaintiff the opportunity to discover whether actions of complaint counsel have improperly tilted their prospective witnesses against willingly granting ex parte interviews to plaintiff's counsel, and in refusing to determine that an interlocutory appeal was, under the circumstances, justified. Copies of said petition and of complaint counsel's reply dated May 17, 1976 are attached as Exhibits IX and X, respectively.

By order dated May 25, 1976, the Commission denied the petition for discretionary review on the basis that "there has been no showing of a clear abuse of discretion on the part of the Administrative Law Judge." A copy of the order is attached as Exhibit E to the moving affidavit.

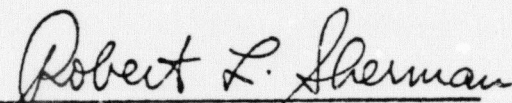
20. On June 9, 1976, plaintiff instituted the instant action requesting this Court to order the Commission to allow it to conduct discovery into whether counsel for the Commission improperly influenced any of their prospective witnesses not to grant ex parte interviews to plaintiff's counsel.

* In its petition to the Commission itself (infra, ¶19) plaintiff demonstrated the flaws in these props. (Exhibit IX hereto, pp. 12 - 15.)

21. Inasmuch as the inadequacy of any deferred remedy relates, in part at least, to the magnitude, complexity, and anticipated duration of the administrative proceeding (discussed in our accompanying memorandum), there are attached hereto, as Exhibits XI, XII, XIII, and XIV, respectively, copies of the involved issues of fact and of law as specified in a prehearing order of March 13, 1974, complaint counsel's document list, complaint counsel's witness list, and complaint counsel's pretrial brief.


Gerald Guttman

Sworn to before me this
3d day of September 1976.


Notary Public

ROBERT L. SHERMAN
No. 524620086
Notary Public State of New York
Qualified in Suffolk County
Certificate Issued in New York County
Commission Expires March 31, 1977

Exhibit I

-115a-

Exhibit I

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

Docket No. 8917

To: Honorable Montgomery K. Hyun,
Administrative Law Judge

RESPONDENTS' APPLICATION FOR ISSUANCE
OF SUBPOENAS AD TESTIFICANDUM AND SUB-
POENAS DUCES TECUM TO COMPLAINT COUNSEL
IN DOCKET NOS. 8917, 8918 AND 8919

Bristol-Myers, on behalf of all respondents, hereby requests, pursuant to section 3.36 of the Rules of Practice, issuance of the attached subpoenas to complaint counsel herein and complaint counsel in the two companion analgesic cases, American Home Products, Docket No. 8918 and Sterling Drug, Docket No. 8919.

During the pre-hearing conference on March 3, 1976, the Administrative Law Judge clearly and correctly recognized the importance to respondents' counsel, in preparing the defense of their clients that they be able to confer, out of the presence of complaint counsel, with any of the latter's

prospective witnesses whose uninfluenced volition would be to grant such interviews.

However, there is a serious question as to whether complaint counsel's communications with such witnesses, or certain of them, may not have so altered what would otherwise have been their unbiased willingness as to deprive respondents prejudicially of the benefit of those ex parte interviews and, hence, of a fair trial. If that has been the situation, then, obviously, some adequately corrective measures must be instituted.

Determining whether it has been the situation is largely dependent upon what, precisely, the content and actual verbiage was of complaint counsel's communications with the prospective witnesses. Complaint counsel's own memories, correspondence, recordations and reports of such communications are the handiest and most expeditiously available means of access to the verbatim, or close to it as possible, content of their oral and written interchanges with the prospective witnesses on the subject.

The need for issuance of the subpoenas to complaint counsel in the two related cases, as well as here, is evident from the fact that a number of the same witnesses will be testifying in all three cases, and complaint counsel in any

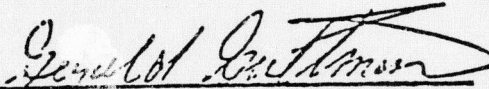
one of the case. may have conferred with c or more of the witnesses in this case. In fact, three of the witnesses in this matter have indicated that they have communicated with complaint counsel in American Home.

The general relevancy and reasonableness of the scope of the application are self-apparent from the facts set forth above. Additionally, the complete data needed to assess the nature and effect of complaint counsel's communications is not available, either voluntarily or pursuant to §§3.33-3.34, from other sources; only complaint counsel can give us their memories, recollections and recordations of what transpired. Furthermore, eight out of the twenty-three witnesses to whom Bristol-Myers' counsel has written requesting voluntary interviews regarding their anticipated testimony have not answered or even acknowledged receipt of the letters. In any event, to go about getting information from widely dispersed witnesses would be inordinately expensive and time consuming, compared to obtaining it centrally from the source -- complaint counsel themselves.

In view of the foregoing, it is respectfully requested that this application be granted.

Respectfully submitted,

WEIL, GUTTMAN & DAVIS

By 

Gerald Guttman
Attorneys for Respondent
Bristol-Myers Company
Office and P. O. Address
60 East 42nd Street
New York, New York 10017

Dated: New York, N. Y.

March 12, 1976

SUBPOENA AD TESTIFICANDUM
and
SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

To Lynne C. McCoy

James H. Skiles

W. Benjamin Fisherow

You are hereby required to appear before The Honorable
Montgomery K. Hyun,

an Administrative Law Judge of the Federal Trade Commission, or any person
having the power to administer oaths, at The 1101 Building,
414 Eleventh Street, N.W., 7th Floor,
in the City of Washington, D. C.

on the 1st day of April, 1976, at 10:00 a.m.,
to testify at the instance of respondents in Docket No. 8917 as to any
communication with any of the witnesses designated on the "Wit-
ness List" herein concerning the subject of engaging in inter-
views with any of respondents' counsel,

and you are hereby required to bring with you and produce at said time and
place the following books, papers, and documents:

SEE ATTACHED SPECIFICATION

Fail not at your peril.

In testimony whereof, the undersigned, an Administrative
Law Judge of the Federal Trade Commission, has hereunto
set his hand and the said Federal Trade Commission has caused
its seal to be affixed at Washington, D.C., this _____ day of
_____, 19____.

Administrative Law Judge

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

SPECIFICATION

All communications to or from any of the witnesses designated on the "Witness List" in Docket No. 8917, and all records, including, but not limited to, notes, memoranda and interview reports, of any conversation held with any of such witnesses which relate in any manner to the subject of engaging in interviews with any of respondents' counsel.

SUBPOENA AD TESTIFICANDUM
and
SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

To Thomas J. Donegan, Jr.
Leroy M. Yarnoff
Robert D. Zsalman

You are hereby required to appear before The Honorable
Montgomery K. Hyun,

an Administrative Law Judge of the Federal Trade Commission, or any person
having the power to administer oaths, at The 1101 Building,
414 Eleventh Street, N.W., 7th Floor,
in the City of Washington, D. C.

on the 1st *day of* April, 1976, *at* 1:00 p.m.,
to testify at the instance of respondents in Docket No. 8917 as to any
communication with any of the witnesses designated on the "Wit-
ness List" herein concerning the subject of engaging in inter-
views with any of respondents' counsel,

and you are hereby required to bring with you and produce at said time and
place the following books, papers, and documents:

SEE ATTACHED SPECIFICATION

Fail not at your peril.

In testimony whereof, the undersigned, an Administrative
Law Judge of the Federal Trade Commission, has hereunto
set his hand and the said Federal Trade Commission has caused
its seal to be affixed at Washington, D.C., this *day of*
....., 19.....

Administrative Law Judge

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

SPECIFICATION

All communications to or from any of the witnesses designated on the "Witness List" in Docket No. 8917, and all records, including, but not limited to, notes, memoranda and interview reports, of any conversation held with any of such witnesses which relate in any manner to the subject of engaging in interviews with any of respondents' counsel.

SUBPOENA AD TESTIFICANDUM
and
SUBPOENA DUCES TECUMUNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

To H. Robert Field
..... Richard A. Bloomfield
..... David Freeman

You are hereby required to appear before The Honorable
Montgomery K. Hyun,
.....
an Administrative Law Judge of the Federal Trade Commission, ~~or~~ or any person
having the power to administer oaths, at The 1101 Building,
414 Eleventh Street, N.W., 7th Floor,
in the City of Washington, D. C.
on the 1st day of April, 1976, at 3:00 p.m.,
to testify at the instance of respondents in Docket No. 8917 as to any
communication with any of the witnesses designated on the "Wit-
ness List" herein concerning the subject of engaging in inter-
views with any of respondents' counsel,
and you are hereby required to bring with you and produce at said time and
place the following books, papers, and documents:

SEE ATTACHED SPECIFICATION

Fail not at your peril.

In testimony whereof, the undersigned, an Administrative
Law Judge of the Federal Trade Commission, has hereunto
set his hand and the said Federal Trade Commission has caused
its seal to be affixed at Washington, D.C., this day of
....., 19.....

Administrative Law Judge

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

SPECIFICATION

All communications to or from any of the witnesses designated on the "Witness List" in Docket No. 8917, and all records, including, but not limited to, notes, memoranda and interview reports, of any conversation held with any of such witnesses which relate in any manner to the subject of engaging in interviews with any of respondents' counsel.

Exhibit II

-125a-

Exhibit II

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

TO: Honorable Montgomery K. Hyun
Administrative Law Judge

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS'
APPLICATION FOR SUBPOENAE AGAINST COMPLAINT COUNSEL

Respondents have filed an application for issuance of subpoenae duces tecum and ad testificandum against complaint counsel in the three analgesics cases pursuant to §3.36 of the Commission's Rules of Practice. These subpoenae seek the following three classes of information each of which is confined to the subject of engaging in interviews with counsel for respondents in Docket No. 8917: (1) correspondence from complaint counsel to our expert witnesses or documents memorializing conversations with our experts; (2) correspondence from expert witnesses to complaint counsel; and (3) complaint counsel's testimony concerning conversations with our experts. Complaint counsel in Docket No. 8917 oppose the aforesaid application on behalf of all complaint counsel in these proceedings.

Our opposition is premised on two general grounds detailed below. The first of these is that, as the only support for their application, respondents are advancing an argument already clearly decided against them by the Administrative Law Judge. The second ground is that the documentary and testimonial demands of respondents' subpoenae reach beyond the scope of permissible discovery by calling for the production of attorneys' work product and other documents not properly discoverable at this time.

I. The ALJ Has Already Decided The Issues Presented By Respondents' Application

During the pre-hearing conference of March 3, 1976, the Judge determined that the expert witnesses on complaint counsel's Witness List in Docket No. 8917 were entitled, if they so desired, to have complaint counsel attend interviews held with respondents' counsel.*/ He stated that the same determination would apply to complaint counsel's interviews with respondents' experts. The Judge also sought to avoid any possibility of surprise at trial for either side which could conceivably arise from an expert witness' uniformed assumption that he must grant opposing counsel an ex parte interview. Accordingly, the Judge expressly authorized complaint counsel to communicate his ruling to our experts. **/

*/ Transcript at 24.

**/ Id.

Later in the conference, counsel for Bristol-Myers argued that permitting complaint counsel to inform our experts of the Judge's determination was tantamount to permitting us "to influence and bias what might otherwise be their spontaneous approach" to the prospect of an ex parte interview. */ The record shows that the Judge unequivocally rejected respondents' argument, and that he believed our experts should be able to make an informed choice to have counsel present. He further adhered to his belief that complaint counsel should be allowed to communicate his determination to our experts. **/

Nevertheless, as the sole support for their instant application for subpoenae, respondents present precisely the same argument again. ***/ Since the Judge has fairly and correctly decided that our experts were entitled to know that they could choose to have complaint counsel attend interviews with respondents, we believe that the question is settled and that respondents' repeated efforts on this matter should be rejected.

*/ Transcript at 26. Respondents' argument is embarrassingly close to suggesting that a party should not be informed of his right to counsel since to do so will influence him to exercise that right.

**/ Transcript at 26, 27.

***/ Respondents' Application, at page 2, states: "However, there is a serious question as to whether complaint counsel's communications with such witnesses, or certain of them, may not have so altered what would otherwise have been therein unbiased willingness to deprive respondents prejudicially of the benefit of those ex parte interviews, and, hence, of a fair trial."

Moreover, the respondents' assertions that they will be denied a fair trial unless these interviews are ex parte are without merit. The purpose of the interviews is to allow the respondents an opportunity to discuss the content of the witnesses' intended testimony so that there might be no surprises during the hearings. Since complaint counsel have no intentions of impeding that purpose, our presence will in no way prevent the respondents from fully exploring the proposed testimony. Indeed, were these interviews to be mandatory depositions, rather than voluntary meetings, complaint counsel would have an absolute right to be present, and the respondents could hardly be heard to argue that they were being denied a fair trial.

II. Respondents' Subpoena Impermissibly
Calls for the Production of Attor-
ney's Work Product

Respondents' application should also be rejected because it improperly calls for the production of complaint counsel's "work product". Correspondence from complaint counsel to our witnesses, memoranda prepared by complaint counsel which relate to conversations held with our witnesses, and our testimony concerning such conversations fall within the work product rule and are not discoverable. The fact that respondents have limited the scope of their demand to information dealing with the subject of interviews does not affect the applicability of the work product privilege.

Commission cases have long recognized that the work product

privilege announced in Hickman v. Taylor, 329 U.S. 495 (1947), is applicable to discovery requests under the Commission's Rules of Practice for the production of Commission documents. See, e.g., Inter-State Builders, Inc., 69 F.T.C. 1152 (1966). Briefly stated, the work product doctrine holds that an attorney's work in preparation for litigation - his accumulation of files, sifting or relevant evidence from irrelevant, interviews, statements, memoranda, correspondence, mental impressions, personal beliefs, legal theories and strategies are privileged from discovery. See, Hickman v. Taylor, *supra*, at 510-511. Correspondence from an attorney to a witness or potential witness was explicitly included in the work product doctrine in Hickman. Cf. Mohawk Refining Corp. v. FTC, 263 F.2d 818, 821-22. (3rd Cir. 1958); cert. denied, 361 U.S. 814 (1959). Likewise, complaint counsel's own "notes, memoranda, or interview reports" relating to conversations with our witnesses, and our testimony with respect thereto, fall within the privilege because they represent recollections and impressions distilled by the attorney from such conversations.

III. Correspondence from Complaint Counsel's Experts is not Unavailable

If all recognized work product demands are excluded from the subpoena specification, what remains is a demand for specified communications from the witnesses on our Witness List in Docket No. 8917. However, all statements or writings authored by a witness who testifies for complaint counsel are covered

by the Jencks Act, 18 U.S.C. §3500 (1970), which the Commission has applied to administrative hearings. See, Inter-State Builders, Inc., 69 F.T.C. 1152 (1966). Complaint counsel are not required to turn these Jencks Act items over to respondents until after the witness has actually testified. Indeed, the Commission has specifically determined that materials under the Jencks Act are not properly the subject of pre-trial discovery. Inter-State Builders, Inc., supra. There the Commission held that production of Jencks Act material may be demanded only after the witness has testified on direct examination.

It is clear that Jencks rule was designed solely as a rule to ensure that defendants would be fully protected in their rights of cross-examination. The rule was never envisaged as a general rule of discovery. Viewing the rule in this manner it is clear that demands for production or Jencks statements in advance of a witness' testimony would be premature. In some instances, the witness might not ultimately be called upon to testify. In other instances a witness' testimony might be unrelated to prior statements which he made to the government.

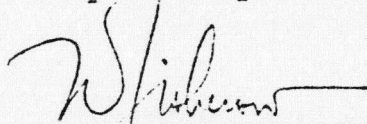
Inter-State Builders, Inc., supra at 1166. */ Thus, in those instances where respondents demand documents which are not work product, they demand documents which are not properly discoverable now and which will be made available to them by complaint counsel at a later date.

*/ Despite the clear absence of a requirement to do so, complaint counsel intend to turn over all statements of witnesses in our possession prior to their direct testimony.

IV. Conclusions

For the reasons set forth above, respondents' application for subpoenae against complaint counsel in all three cases should be rejected in toto.

Respectfully submitted,

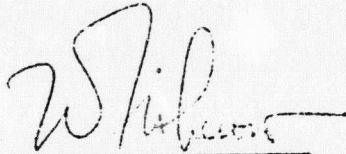


W. Benjamin Fisherow
Complaint Counsel

Dated: March 22, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all other parties to this proceeding by hand delivery of the original and requisite number of copies to the Office of the Secretary, Federal Trade Commission, and by mailing copies thereof to counsel for all respondents.

A handwritten signature in dark ink, appearing to read "W. Benjamin Fisherow", is written over a horizontal line.

W. Benjamin Fisherow
Complaint Counsel

Dated: March 22, 1976

Exhibit III

-134a-

Exhibit III

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

Docket No. 8917

To: Honorable Montgomery K. Hyun
Administrative Law Judge

MOTION FOR RECONSIDERATION OF THE
ORDER DENYING RESPONDENTS' APPLICATION
FOR ISSUANCE OF SUBPOENAS TO COMPLAINT
COUNSEL IN DOCKET NOS. 8917, 8918 AND 8919

Respondent Bristol-Myers, on behalf of all respondents, respectfully moves for reconsideration of the order, dated March 23, 1976, denying respondents' application for issuance of subpoenas to complaint counsel in the three companion analgesic cases.

The reasons for granting this application are twofold. First, the order was issued before receipt of respondents' reply even though counsel understood that a ruling would not be made until after its consideration. Second, the facts and arguments set forth in said reply, as well as those enumerated below, will reveal that the aforesaid order should be revoked and respondents' application granted.

On March 24, 1976, Bristol-Myers received complaint counsel's response (dated March 22, 1976) to respondents' application for issuance of the aforementioned subpoenas. In view of the various erroneous arguments contained therein, respondents decided to request permission to file a reply thereto. Knowing the tendency of the Administrative Law Judge to decide a motion as rapidly as possible, and attempting to avoid the possibility of a ruling prior to receipt of the reply papers, respondent Bristol-Myers' counsel called the Administrative Law Judge on March 25, 1976 to advise him that a reply would be served the following day. Counsel understood that the Administrative Law Judge would await receipt of the papers before deciding the matter. The reply was served and hand delivered to the Administrative Law Judge on March 26, 1976.

On March 29, 1976, however, counsel for respondent Bristol-Myers received the March 23, 1976 order denying respondents' applications for subpoenas. Thus, the ruling was made in advance of receiving, and without considering, the reply papers, a copy of which is attached hereto.

One of the reasons given for denying the application was that respondents can "ascertain from individual witnesses at the interviews the information they now seek through subpoenas" That would be the proper procedure and consistent

with §3.36(b) only if the information sought from complaint counsel came from the witnesses themselves. However, that is not the case. Here we are involved in a different kind of situation. Complaint counsel are not recipients of the information, but are themselves directly involved in the events. Respondents are seeking the conversations and communications to which complaint counsel were direct parties; respondents are entitled to discover the true facts from the best possible source.

Moreover, the rational approach is to first secure the information from complaint counsel. From the point of view of time and expense alone, that is preferable; it would permit the gathering of the information from complaint counsel in one city (Washington, D. C.) and in approximately one day. That is certainly more efficient than going around the entire country to see between 20 - 40 witnesses, an exceedingly expensive and time consuming undertaking. Additionally, if deposing complaint counsel is adequate, it may avoid the need to see many, if not all, of the witnesses to secure similar information.

Another material factor to be considered is that it would be an unfair and unnecessary burden to subject the witnesses to this type of inquiry if the information is obtainable directly from complaint counsel. This is particularly so since the witnesses will have to be closely examined

-- almost to the point of cross-examination -- to discover the real facts. For example, it will require developing from the witnesses the exact words complaint counsel used in discussing the matter with them, including the voice inflections of complaint counsel and the actual impressions conveyed to and perceived by the witnesses. This type of information should properly be secured from complaint counsel in the first instance, rather than infringing upon the time of the witnesses.¹

A second reason for denying the application for subpoenas was that "respondents have shown no justification other than a mere suspicion that some witnesses may have been, or may be, influenced by complaint counsel in some manner inconsistent with the guidelines." Respondents, however, have a great deal more than "mere suspicion" to justify the necessity for granting the subpoenas. As pointed out in their reply (page 2), complaint counsel stated during the pre-hearing conference on March 3, 1976 that they have a "right to be present at any of these meetings." That, of course, is not so. With that conviction, however, it necessarily follows that they gave such advice to their witnesses, thereby improperly instructing the witnesses not to see respondents' counsel unless complaint counsel were present.

¹ If it is determined that the witnesses should be interviewed first, respondents now mention that it may necessitate seeing these witnesses on two occasions -- once to get this issue resolved and then to discuss the merits of the controversy.

More importantly, respondents' counsel can assure the Administrative Law Judge that they do possess very substantial evidence that complaint counsel have exceeded the guidelines and polluted the situation with a number of witnesses. Since counsel are entitled not to reveal this evidence to complaint counsel in advance (being permitted to maintain it for cross-examination purposes), they offer to disclose the evidence to the Administrative Law Judge in camera. That very real evidence, if the Administrative Law Judge desires to view it, will prove that there is substance, rather than "mere suspicion", to warrant issuing the subpoenas.

Finally, the order states that "respondents will receive from complaint counsel all statements of witnesses in complaint counsel's possession prior to their testimony." That was apparently mentioned as a helpful step in the attempt to resolve this question. Those statements, however, will not reveal the type of information here sought. Realistically, the statements will relate only to the merits of the controversy, rather than to the subject matter here involved -- what role complaint counsel actually played in foreclosing ex parte interviews. And, as explained above, it is complaint counsel's statements and communications -- not those of the witnesses -- which will disclose the true facts.

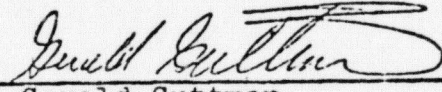
If, despite the above, it is determined that the witnesses are to be interviewed first, respondents should be

permitted to do so in the absence of complaint counsel. The interviews can only be meaningful if they take place in a "shirt-sleeve" atmosphere where the witnesses can discuss the matter openly and where spontaneous answers to counsel's questions can be secured. The very presence of complaint counsel would have a serious impact on the witnesses' responses -- they would naturally be careful and reluctant to discuss the matter frankly. Therefore, to avoid frustrating the purpose of the interviews and to truly ascertain whether complaint counsel improperly influenced the witnesses' determinations not to grant ex parte interviews, they should be held without complaint counsel being present.

In view of the foregoing, reconsideration should be granted and an order issued granting the subpoenas requested by respondents' application dated March 12, 1976. In the alternative, if it is determined that the interviews with the witnesses should be conducted first, an order should issue permitting those interviews to be held in the absence of complaint counsel and directing that complaint counsel not communicate in any manner with the witnesses concerning the subject matter involved until after respondents' counsel have discussed the matter with them.

Respectfully submitted,

WEIL, GUTTMAN & DAVIS

By 
Gerald Guttman
Attorneys for Respondent
Bristol-Myers Company
Office and P. O. Address
60 East 42nd Street
New York, New York 10017

Dated: New York, New York
April 1, 1976

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

Docket No. 8917

To: Honorable Montgomery K. Hyun
Administrative Law Judge

RESPONDENTS' REQUEST FOR PERMISSION
TO REPLY TO COMPLAINT COUNSEL'S RE-
SPONSE TO RESPONDENTS' APPLICATION
FOR SUBPOENAE AGAINST COMPLAINT
COUNSEL

Respondent Bristol-Myers, on behalf of all respondents, respectfully requests permission to reply to "Complaint Counsel's Response to Respondents' Application for Subpoenae Against Complaint Counsel", dated March 22, 1976.

This reply is required to point out the incorrect statements and erroneous arguments in complaint counsel's responding papers.

Complaint counsel argue (pp. 2 through 4) that the Administrative Law Judge has already decided the propriety of respondents' application during the pre-hearing conference of March 3, 1976. That is not so. During the conference it was stated that complaint counsel could communicate the ruling to the witnesses, i.e., if it were the "desire" of the expert witness, complaint counsel may be present during his interview (Tr. p. 24). No determination was made, however, of whether complaint counsel exceeded permissible limits or whether the witnesses were already improperly influenced so as to prejudicially obstruct respondents' rights to ex parte interviews. In fact, a ruling could not have been made on that question since the true facts concerning the advice that complaint counsel gave to their witnesses were not known or available to the Administrative Law Judge at the time of the conference. That is clear from complaint counsel's own statements; in one instance, complaint counsel commented that they have a "right to be present at any of these meetings" (Tr. p. 21) and, at another point, she stated they only "suggested" that they be present (Tr. p. 22). Only by issuing the subject subpoenae can it be determined what role complaint counsel actually played in the witnesses' refusal to see respondents' counsel without complaint counsel being present.

Complaint counsel also assert (p. 4) that their presence would not impede the interviews. That is only conjecture and is not in issue. The question is whether the witnesses would have discussed the matters in the absence of complaint counsel if they were not cautioned or influenced not to do so. Respondents have a right to know whether complaint counsel's communications foreclosed this fundamental right.

Complaint counsel then claim that, in any event, the applications should be rejected because they require the production of complaint counsel's "work product" (pp. 4-5). That is not the case. Respondents' subpoenae do not call for documents falling within the category of materials used "in preparation for litigation", i.e., documents revealing complaint counsel's mental processes or legal theories. The subpoenae seek only those documents, or portions thereof, relating to communications between complaint counsel and their witnesses which concern "the subject of engaging in interviews with any of respondents' counsel" (see specifications); not their "work product".*

* Certainly, if a document contains some "work product" material, the non-privileged portion can be carved from the privileged matter. Moreover, assuming "work product" material is involved, a showing of "good cause" will necessitate production, Hickman v. Taylor, 329 U.S. 495, 511-512; here such justification certainly exists.

Finally, complaint counsel contend (pp. 5-6) that the applications should be denied since correspondence from the experts is not discoverable at this time under the Jencks Act. That argument has no merit. Respondents are not here seeking statements from the witnesses concerning their opinions on the issues involved in this matter. Furthermore, much, if not all, of the material being sought is complaint counsel's own correspondence or recordations of communications with their witnesses - not statements of their witnesses. Beyond that, since complaint counsel have voluntarily agreed to "turn over all statements of [their] witnesses . . . prior to their direct testimony" (p. 6) - thereby voluntarily agreeing to waive the provisions of the Jencks Act - they should be required to do so now, the most appropriate time to determine whether they have improperly deprived respondents of the benefit of ex parte interviews.

Dated: New York, New York
March 26, 1976

Respectfully submitted,

WEIL, GUTTMAN & DAVIS

By _____
Gerald Guttman
Counsel for Respondent
Bristol-Myers Company
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

Exhibit IV

-145a-

Exhibit IV

FILE 017

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

TO: Honorable Montgomery K. Hyun
Administrative Law Judge

COMPLAINT COUNSEL'S ANSWER TO RESPONDENTS'
MOTION FOR RECONSIDERATION OF THE JUDGE'S
MARCH 23, 1976 ORDER DENYING THEIR APPLI-
CATION FOR SUBPOENAS

Respondents have moved for reconsideration of the Judge's Order of March 23, 1976 which denied respondents' application for issuance of subpoenas to complaint counsel in the three analgesics cases. Complaint counsel in Docket 8917, on behalf of all complaint counsel, hereby answer and oppose respondents' motion.

This matter involves respondents' obstinate efforts to convince the Judge that complaint counsel have infringed on their assertedly "fundamental right" to hold ex parte interviews with our expert witnesses. Although, as the Judge explicitly permitted, we have informed our experts of their right to have counsel during interviews, respondents continue to believe that complaint counsel have improperly instructed our experts not

to see them unless complaint counsel are present. Respondents submit that they are entitled to subpoena our files and to depose us in order to determine whether in fact, complaint counsel have exceeded the terms of the Judge's express permission.

In their Motion for Reconsideration of April 2, 1976, respondents aver that they possess a great deal more than "mere suspicion" to justify their need for these subpoenas. They dramatically announce, for the first time, that they already possess "very substantial evidence" */ of complaint counsels' improper conduct; evidence apparently so sensitive that they will not even submit it to the Judge in camera unless and until he requests them to do so. We wonder what this "evidence" is. To the best of complaint counsel's knowledge, no expert witness has, contrary to the Judge's guidelines, been instructed not to see respondents' counsel unless we are present. As stated, we have sent letters to each witness informing him, as the Judge explicitly permitted, that we may attend the interviews with respondents' counsel if the witness desires us to be there. We can hardly believe respondents feel those letters to be such valuable evidence that they will not even submit them to the Judge in camera without his express request to do so.

Furthermore, respondents' reference to clandestine evidence of impropriety debases the record in this proceeding. It

*/ Motion for Reconsideration at p.5.

is scandalous to accuse counsel of disobeying the directives of the Judge by citing evidence of such disobedience which then is intentionally withheld. Respondents' "entitlement" to preserve the secrecy of this evidence for some parenthetically noted purpose of cross-examination makes a mockery of their grasping efforts to find some semblance of support for their motion for reconsideration. */

Respondents also erroneously assert, as they have previously, that the subpoenas should be granted because complaint counsel are better sources of evidence of the subjective reactions and impressions of our expert witnesses than are those witnesses themselves. But if it is impressions and "voice inflections" that respondents really seek through their compulsory process, they are obviously searching in the wrong place. It should be clear that it is the witness, who formed the impression and who heard and reacted (presumably) to our voice inflections, who is the only source of this evidence of complaint counsel's alleged coercion. The Judge has already correctly recognized this fact in denying respondents' initial application for subpoenas against complaint counsel, and respondents have adduced no persuasive argument on this score now to compel a reversal of this earlier decision.

*/ Complaint counsel, in separate papers filed today, move to strike, as scandalous, the references to complaint counsel's misconduct based upon evidence which respondents refuse to produce.

The simple fact is that respondents continue to refuse to believe that a witness, if given the choice, might not desire to meet alone with those who will later cross-examine him. Respondents have not adduced any evidence of allegedly improper conduct on complaint counsel's part, much less the "smoking gun" they now dramatically assert is lurking in the wings. They have failed to offer any evidence, other than their suspicions, that any witness has been coerced by complaint counsel. Neither their Motion for Reconsideration of April 2, 1976, nor their Reply of March 25, 1976, contains any evidence that would justify a reversal of the Judge's March 23 Order denying the Application for subpoenas.

If the Judge refuses to grant their Application, respondents have now fashioned new demands. They ask the Judge first to issue a gag order on complaint counsel and then to order ex parte interviews with our experts solely to enable respondents to "closely examine" them, as respondents put it, on complaint counsel's conduct. Indignant that our witnesses have chosen not to meet with them alone, respondents now ask the Judge to order them to. Respondents then argue in support, in an extraordinary display of disingenuity, that the witnesses in these ex parte interviews will somehow feel "spontaneous" and that the interviews will be conducted in a "shirt-sleeve atmosphere." The unreasonable idea of two wholly separate interviews with these busy experts is hard enough to swallow, but when the sole purpose of the first of these interviews is to allay suspicions which respondents have yet to support with any record evidence, the idea becomes absurd. Respondents' disingenuous attempt at masquerading such an interview as "spontaneous" and "shirt-sleeve" only serves to confirm the Judge's earlier, correct observation that respondents

are seeking to conduct nothing less than an inquisition. Respondents' persistent efforts on this issue can only suggest that their primary interest at this point is in delaying the progress of this case at every juncture.*/

Enough is enough. The Judge was correct in denying this application for subpoenas in his March 23 Order. We respectfully submit that he should likewise dispose of respondents' Motion for Reconsideration. And with respect to respondents' extraordinary request for a gag order and separate ex parte interviews solely to interrogate, "almost to the point of cross-examination"**, our expert witnesses on complaint counsel's conduct in advising them of their right to have counsel at interviews, we respectfully urge that the Judge reject these requests as the patent waste of time they assuredly are. If in their substantive interviews with our experts, respondents determine that complaint counsel have violated the Judge's directives, let them come, then, to

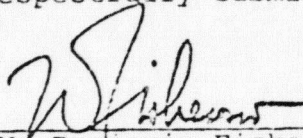
*/ In the American Home Products case, Docket 8918, respondents' interviews with expert witnesses are proceeding smoothly. Complaint counsel have attended all interviews held to date and also have offered assistance in scheduling them. Indeed, counsel for American Home stated at the pre-hearing conference of March 4, 1976 that complaint counsel's efforts in this regard (far from infringing upon his client's fundamental rights) were appreciated.

In contrast, Bristol-Myers' position on ex parte interviews portends considerable delay. For example, Bristol-Myers has already declined a request to schedule an interview with one of complaint counsel's experts from the West Coast while he will be in Washington solely because complaint counsel expect to attend such interview. See letter from James H. Skiles, Esq. to Gilbert H. Weil, Esq. of March 29, 1976 and response thereto of April 2, 1976 (Both attached).

*/. Motion for Reconsideration at page 4.

the Judge with the evidence and apply for appropriate relief.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'W. Benjamin Fisherow', written over a horizontal line.

W. Benjamin Fisherow
Complaint Counsel

Dated: April 9, 1976

JW

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

March 29, 1976

Gilbert H. Weil, Esquire
Weil, Guttman & Davis
60 East 42nd Street
New York, New York 10017

Re: In the Matter of
Bristol-Myers Co. et al.
Docket No. 8917

Dear Mr. Weil:

Dr. William Forrest has asked me to inform you that he will be in Washington on Friday, April 30, and that he would be willing to meet with you on that date if the meeting can take place late (i.e., at 3:30 or 4:00 p.m.) in the day. He also could meet with you in Washington on the morning of Monday, May 3. However, he would very much prefer the April 30 date, if at all possible.

Please let Dr. Forrest and me know whether you will want to meet with him on either of the above dates.

Very truly yours,

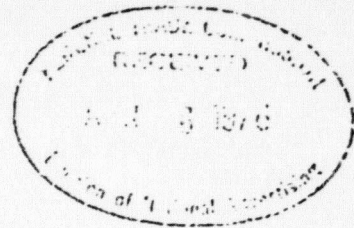
James H. Skiles
Attorney

cc: William Forrest, M.D.

1-152a-10

GILBERT H. WEIL
GERALD GUTTMAN
JAY SANDS DAVIS
—
MICHAEL M. MALKIN
ROBERT L. SHERMAN
BRUCE R. HAFNER

LAW OFFICES OF
WEIL, GUTTMAN & DAVIS
60 EAST 42ND STREET
NEW YORK, N. Y. 10017
—
(212) 687-8573



April 2, 1976

James H. Skiles, Esq.
Bureau of Consumer Protection
Federal Trade Commission
Washington, D. C. 20580

Re: In the Matter of Bristol-Myers
Company, et al., Docket No. 8917

Dear Mr. Skiles:

With respect to your letter of March 29, 1976 referring to Dr. William Forrest, neither of the dates proposed for meeting with him would be appropriate, assuming that, as indicated in his letter to me of February 27, 1976 (with a copy to Thomas J. Donegan, Jr., Esq.), a representative of the Commission would have to be present.

We are actively taking measures to enforce what we believe to be the fullest extent of our right to interview prospective witnesses such as Dr. Forrest ex parte. Until that issue is finally resolved, we prefer not to waive or curtail any rights in that respect by going forward prematurely with our said interviews.

Of course, if Dr. Forrest is willing to meet with us ex parte, either of the dates and times mentioned in your letter will be quite suitable. I am sending him a copy of this letter so that he can advise me, either directly or through you, of his position on this.

Very truly yours,

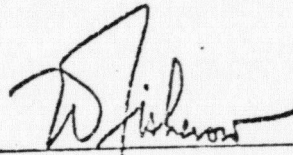
GHW:rb

cc: William H. Forrest, Jr., M.D.

W.H.F.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all other parties to this proceeding by hand delivery of the original and requisite number of copies to the Office of the Secretary, Federal Trade Commission, and by mailing copies thereof to counsel for all respondents.

A handwritten signature in dark ink, appearing to read "W. Benjamin Fisherow", is written over a horizontal line.

W. Benjamin Fisherow
Complaint Counsel

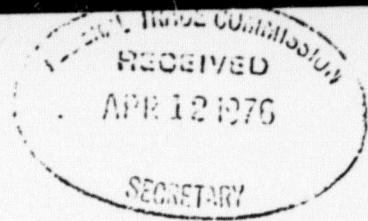
Dated: April 12, 1976

Exhibit V

-155a-

Exhibit V

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
BRISTOL-MYERS COMPANY
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

TO: Honorable Montgomery K. Hyun
Administrative Law Judge

MOTION TO STRIKE PORTIONS OF RESPON-
DENTS' APRIL 1, 1976 MOTION FOR
RECONSIDERATION

Complaint counsel in Docket 8917, on behalf of all complaint counsel in the three analgesic cases, hereby move to strike from the record in this proceeding scandalous references, in respondents' above-referenced motion, to evidence of misconduct which respondents refuse to produce.

At page 5 of respondents' April 1, 1976 Motion for Reconsideration, they aver that they:

possess very substantial evidence
that complaint counsel have exceeded
the [Judge's] guidelines and polluted
the situation with a number of witnesses.

Respondents refuse to put these incriminating materials
on the record:

[S]ince counsel are entitled not to
reveal this evidence to complaint
counsel in advance (being permitted
to maintain it for cross-examination
purposes)....

Respondents also do not feel it necessary to submit this evidence to the Judge, even in camera, unless and until he requests them to do so.

These tactics are scandalous, and complaint counsel move to strike the first paragraph of page 5 of respondents' motion which refers to this clandestine "very substantial evidence" of impropriety. A charge of misconduct is an obviously serious accusation; one that merits substantiation on the record, or, at the very least, an adequate explanation of why substantiation possessed is being intentionally withheld. Respondents apparently feel no such compulsion. They neither explain what the "very substantial evidence" is nor why they have declined to produce it. They are content to accuse complaint counsel on the record of disobedience to an order of the Judge based upon unspecified materials which, for all we know, or the Judge knows, may be inauthentic, or subject to misinterpretation, or taken out of context or otherwise incompetent.

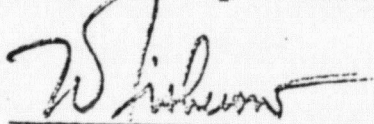
Respondents' only attempt to justify these tactics is their ambiguous, parenthetical reference to cross-examination. This excuse is inadequate. Complaint counsel are alleged to have acted improperly in an area that has nothing to do with any substantive issue in this case. We, therefore, wonder how respondents intend to use this evidence in cross-examining any witness. Or do respondents intend to cross-examine complaint counsel?

Moreover, if respondents really feel they are aggrieved by complaint counsel's conduct, and if they already possess "very

"substantial evidence" of alleged misconduct, why are they bothering with subpoenas? The Judge's March 23 Order clearly tells respondents they may "move for appropriate relief should any case of improper influence come to light." Yet, respondents refuse to lay their "very substantial evidence" on the table, and to resolve, once and for all, the question surrounding our advising our witnesses of their right to counsel.

There is simply no justification for permitting unsubstantiated ad hominem aspersions to remain on the record. Accordingly, we respectfully urge the Judge to strike paragraph 1, page 5 of respondents' Motion for Reconsideration which refers to evidence of impropriety which respondents refuse to produce.

Respectfully submitted,

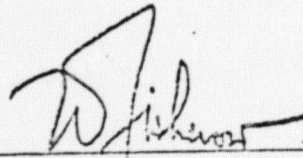


W. Benjamin Fisherow
Complaint Counsel

Dated: April 9, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all other parties to this proceeding by hand delivery of the original and requisite number of copies to the Office of the Secretary, Federal Trade Commission, and by mailing copies thereof to counsel for all respondents.

A handwritten signature in dark ink, appearing to read "W. Benjamin Fisherow", is written over a horizontal line.

W. Benjamin Fisherow
Complaint Counsel

Dated: April 12, 1976

Exhibit VI

-160a-

Exhibit VI

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

Docket No. 8917

To: Honorable Montgomery K. Hyun
Administrative Law Judge

RESPONDENTS' RESPONSE TO COMPLAINT
COUNSEL'S MOTION TO STRIKE PORTIONS
OF RESPONDENTS' APRIL 1, 1976 MOTION
FOR RECONSIDERATION

In their motion to strike dated April 9, 1976, complaint counsel wax righteous and indignant, asserting, in full blown rhetoric, that we have baselessly charged them with misconduct.

Nonsense!

To start with, no charge of moral or ethical misconduct is included in respondents' motion for reconsideration. Respondents have merely pointed out that they possess evidence, available to the Administrative Law Judge for his in camera review, which shows sufficient likelihood that complaint counsel's communications may have biased their witnesses' willingness to see respondents' counsel ex parte, thereby potentially depriving respondents of a fair trial, to warrant full discovery into the situation. Such an improper influence

may well have been exercised in a manner neither immoral nor unethical, but its effect would be no less serious.

The hollowness of complaint counsel's ire is evident from the fact that they themselves are privy to at least two matters which should make it obvious to them that respondents' "suspicions" are not without substance. First, a copy of one of the letters received from a prospective witness (attached as Exhibit 1) was sent by that witness to complaint counsel. It shows that unquestionably he was conditioned in terms far exceeding even the Administrative Law Judge's prescription:¹

"...She has advised me that I may grant you this interview provided that one of the Federal Trade Commission's attorneys be present. May I suggest that you coordinate this interview with the aforementioned proviso in mind." (Emphasis ours.)

Secondly, complaint counsel have so firmly stated on the record a belief that it is their fundamental right to be present during the interviews² that it is quite reasonable to discover whether they have expressed or conveyed this

¹ Which, we respectfully maintain, itself went too far (Tr., pp.389-90 of Prehearing Conference of March 3, 1976).

² "...we think it is really our right to be present at any of these meetings." (Tr., p.385, of Prehearing Conference of March 3, 1976).

same conviction to their prospective witnesses. Exhibit 1 is a prime example. These factors alone, without divulging respondents' other evidence,³ are more than adequate to justify the statements contained in respondents' motion for reconsideration. Moreover, with such evidence, and especially in view of its offer to the Administrative Law Judge, respondents' arguments were wholly proper.

Respondents' earlier related motions made no scandalous imputations, and their basis is not insubstantial. Complaint counsel's motion to strike lacks merit and should be denied.

Dated: New York, New York
April 21, 1976

Respectfully submitted,
WEIL, GUTTMAN & DAVIS

By Gerald Guttman
Gerald Guttman
Attorneys for Respondent Bristol-Myers Company, Office & P.O. Address:
60 East 42nd Street
New York, New York 10017
(212) 687-8573

3

Respondents are not prejudiced by pointing to Exhibit 1 since it is already within complaint counsel's knowledge. The additional evidence respondents possess, however, constitutes their evidentiary and litigative tools which they are not obligated to disclose to opposing counsel. Their offer of in camera display to the Administrative Law Judge, however, still stands.

THE GENESEE HOSPITAL
An Affiliated Hospital
of
THE UNIVERSITY OF ROCHESTER
SCHOOL OF MEDICINE AND DENTISTRY
224 Alexander Street
Rochester, New York 14607

RENE MENGUY, M.D.
Professor of Surgery
Surgeon-in-chief

March 5, 1976

Mr. Gilbert H. Weil
Weil, Guttman & Davis
60 East 42nd Street
New York, New York 10017

Re: Federal Trade Commission v.
Bristol-Myers Company, et al.,
Docket No. 8917

Dear Mr. Weil:

I am responding to your letter of February 11, 1976, letter in which you requested an interview concerning testimony that I might give during the forthcoming hearing involving your client, Bristol-Myers Co., et al. I have consulted with Ms. Lynne C. McCoy representing the Federal Trade Commission. She has advised me that I may grant you this interview provided that one of the Federal Trade Commission's attorneys be present. May I suggest that you coordinate this interview with the aforementioned proviso in mind. May I suggest the following dates: 4/19, 4/20, 4/23 or 4/26/76.

In your letter you suggest that the interview might take from one-half to a full day. I can't think of any topic on this Earth that would take that long to discuss! Anyway, I don't have that much time. You will have to be satisfied with less. May I suggest 1-1/2 to 2 hours?

Sincerely yours,

R. Menguy
Rene Menguy, M.D.

RM:md

CC Ms. McCoy

Exhibit 1

-164a-

Exhibit VII

-165a-

Exhibit VII

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

Docket No. 8917

To: Honorable Montgomery K. Hyun,
Administrative Law Judge

RESPONDENT'S REQUEST FOR A DETERMINATION
PERMITTING AN INTERLOCUTORY APPEAL FROM
THE ORDERS OF MARCH 23, 1976 AND APRIL 5, 1976

Respondent Bristol-Myers respectfully moves, pursuant to Section 3.23(b) of the Rules of Practice, for a determination permitting interlocutory review of the orders of March 23, 1976 and April 5, 1976, denying issuance of subpoenas ad testificandum and duces tecum to complaint counsel in the three companion analgesic cases, Docket Nos. 8917, 8918 and 8919, and other appropriate relief.

Very serious questions of law and policy are involved -- whether complaint counsel have (as they assert) an absolute right to be present during respondent's counsel's interviews with complaint counsel's prospective witnesses and, if not, whether complaint counsel have improperly persuaded their witnesses not to grant ex parte interviews to respondent's

counsel. The two orders from which appeal is sought have effectively foreclosed respondent from determining whether complaint counsel have improperly influenced their witnesses not to meet with respondent's counsel unless complaint counsel are also present. If the witnesses have been so influenced, respondent has been deprived of the fair and free preparation of its case and, hence, of a fair trial.

As will be shown, subsequent review of these controlling questions will be an inadequate remedy.

Background

Complaint counsel, by their Witness List dated December 31, 1975, designated over 65 persons, including approximately 30 experts, as prospective witnesses for the forthcoming hearings. To adequately prepare for trial, counsel for Bristol-Myers contacted a number of them to seek their voluntary cooperation in providing interviews to discuss their anticipated testimony.

During those communications, a number of witnesses replied that they would be willing to meet with respondent's counsel only if complaint counsel were present. It developed that, at least for some of the witnesses, their refusal to permit ex parte interviews was based on information or instructions received from complaint counsel.

Respondent brought the matter to the attention of the Administrative Law Judge during the pre-hearing conference of March 3, 1976.* Responding to the Law Judge's question, complaint counsel stated, "We think it is really our right to be present at any of these meetings".** That, unfortunately, is not complaint counsel's absolute right -- except, of course, if it is the prospective witness's own uninfluenced volition to have complaint counsel present.

* "... Complaint Counsel evidently feel, and assert, that there is something wrong in the efforts we have been making to have their witnesses grant us interviews without Complaint Counsel being present.

I submit, Your Honor, there is absolutely nothing wrong with that. I think we are perfectly within our rights in asking for that favor, even though it is their witnesses and beyond that I am sure it is nothing that they cannot protect themselves on and probably already have, by notifying or telling these witnesses that they need not meet with us without Complaint Counsel or some other of the Federal Trade Commission representative being present." (Tr., p.20.)

** Adding,

"In many cases, the witness, ... has asked to have us present, and, in fact, in those situations where the witness has not asked us to be present, we have suggested that one of us be present at such meeting. We think it is appropriate and it is our right to be present at any meeting respondent's counsel has with our witnesses. (Tr., pp. 21-22, emphasis added.)

The Administrative Law Judge recognized respondent's right to see the witnesses out of the presence of complaint counsel if the witness so desired, and ruled:

"... the party calling that expert witness may be present at the interview of that witness provided that is a desire of that expert witness concerned, and Government counsel have my permission to communicate my ruling to your witnesses." (Tr., p.24.)
(Emphasis added.)*

* The comments of the Administrative Law Judge prior to that ruling are also pertinent:

"... I have given some thought to this issue. As you say, Ms. McCoy, if this were formal depositions, there is no question all of the parties would have notice and have a right to be there, but this is going to be on a voluntary basis.

As to lay witnesses, I think the general practice is to leave this matter to individual witnesses. He could have counsel of his choice at the time of interview and that counsel may be Commission counsel -- it doesn't matter.

Now, as to the -- the same rule should apply to expert witnesses. Our rule we decide on this morning is going to apply to experts for either side. I can understand your desire to be there. I realize that these experts, although they are independent, have been working in close association with you in connection with reviews of documents, literature, and working out the outline of testimony and so forth. I realize that, so that you would want to guard against any surprises, and also would want to know what is going on at these interviews.

On the other hand, with respect to the issues of reasonableness and also the issue of substantial question, a great deal is going to depend on what these experts say and how much weight is to be given to their testimony."

(Footnote cont'd)

In view of the very real likelihood that complaint counsel's communications to their witnesses, or certain of them, have altered what would otherwise have been the witnesses' unbiased willingness to allow ex parte interviews with respondent's counsel, respondent sought to ascertain what role, if any, complaint counsel actually played in influencing the witnesses' decision not to grant such interviews. Accordingly, by its application dated March 12, 1976, respondent sought issuance of subpoenas ad testificandum and subpoenas duces tecum to complaint counsel in the three companion analgesic cases, emphasizing that they were necessary to discover the impact complaint counsel had on their witnesses' decisions to deny ex parte interviews and to develop from their memoranda what actually transpired so that an informed determination could be made whether complaint counsel interfered with respondent's rights. *

(Footnote cont'd)

"Now, one way to meet the Opponent's expert testimony, I suppose, is to present an expert of your own who would give contrary expert opinion. Now, that invites numbers game and I am resolved to do everything in my power to prevent that from occurring. In view of that, I think that perhaps the most effective way of meeting Opponent's expert testimony is an opportunity to impeach his credibility and for that purpose I think that an Opponent should be given every reasonable opportunity to pursue that course, including interviews with Opponent's prospective expert witnesses." (Tr., pp. 23-24.)

* The reason for including in that application complaint counsel in the two other cases (Docket Nos. 8918 and 8919) was that at least one of them had communicated with some of the prospective witnesses in Docket No. 8917.

Complaint counsel responded on March 22, 1976 and, because of inaccurate arguments contained in their papers, respondent, by its application dated and filed on March 26, 1976, sought permission to reply. Unknown to respondent, however, the Administrative Law Judge had already issued an order dated March 23, 1976 (received by respondent's counsel March 29, 1976), denying the requested subpoenas. Two principal reasons were given for the denial: (1) respondents had "shown no justification other than a mere suspicion that some witnesses have been ... [improperly] influenced", and (2) respondents would "be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas".

Because the order was issued prior to the Administrative Law Judge's receipt or consideration of respondent's reply and since not all of the pertinent facts were before the Administrative Law Judge prior to his March 23rd ruling, respondent sought reconsideration by its application dated April 1, 1976. That application pointed out that respondent possessed very real evidence -- not just "mere suspicion" -- that complaint counsel improperly influenced and polluted the situation with a number of witnesses. Respondent offered to disclose such evidence in camera to the Administrative Law Judge. It, alternatively, requested that

if the Administrative Law Judge decided that the information should first be secured directly from the witnesses, that any interviews be held outside the presence of complaint counsel so that they could take place in a "shirt-sleeve" atmosphere where the witnesses could discuss the matter openly and be free to give spontaneous answers to all of counsel's questions, rather than in an environment where the witnesses would be hesitant and reluctant to frankly discuss the matter. *

Nevertheless, by order dated April 5, 1976, the Administrative Law Judge denied the motion for reconsideration, ruling that: (1) "respondents merely reiterate suspicion ... that complaint counsel improperly instructed the witnesses not to see respondents' counsel unless complaint counsel were present", and (2) respondents' alternative request to have the interviews held without complaint counsel would subject the witnesses to repeated interviews and "needlessly prolong the pre-trial proceedings". Yet, those rulings were made without so much as a whisper of respondent's assurance that it possesses concrete evidence to support its motion for reconsideration and that it would submit such evidence in camera

* Respondent also remarked that although it was offering an alternative to deposing complaint counsel, the only proper course to follow was to discover the true facts from complaint counsel since they were directly involved in the events and were not mere recipients of the information.

to the Administrative Law Judge upon request. At the very least, that evidence should have been considered.

Argument

THE TWO ORDERS HAVE EFFECTIVELY
DENIED RESPONDENT THE RIGHT TO
ADEQUATELY PREPARE FOR AND RECEIVE
A FAIR TRIAL.

Respondent has an absolute right to talk to any prospective witness -- in the absence of complaint counsel -- if the witness so desires. Any instruction by complaint counsel to the contrary or any exerted influence by them to change what would have been a witness's own decision to grant an ex parte interview constitutes an infringement of that absolute right.

The orders of March 23, 1976 and April 5, 1976, by refusing to issue the requested subpoenas and by denying respondents ex parte interviews with complaint counsel's witnesses, have denied respondent the opportunity to discover what actually took place between the witnesses and complaint counsel. This is prejudicial to and violates respondent's rights since no other meaningful avenue exists for developing the true facts.

The Law Judge's failure to consider respondent's evidence which plainly indicates that complaint counsel improperly advised and influenced at least some of their witnesses was itself improper. Respondent's counsel were not

obligated or required to disclose their evidence to complaint counsel; they had the right to offer it in camera to the Law Judge. It should have been considered.

The denial of respondent's alternative request to allow the interviews to proceed without complaint counsel's presence was similarly unwarranted. To hold the interviews with complaint counsel in the same room would be a wasted effort -- the witnesses surely would be hesitant and naturally reluctant to say anything that would tend to implicate complaint counsel in any wrongful conduct.*

THE REQUIREMENTS HAVE BEEN MET
FOR A DETERMINATION THAT AN
INTERLOCUTORY APPEAL IS WARRANTED.

Section 3.23(b) provides, in pertinent part:

"... applications for review of a ruling by the Administrative Law Judge may be allowed only upon ... a determination ... that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy."

*Even assuming the requested procedure would "prolong the pre-trial proceedings" as mentioned in the order of April 5, 1976, that certainly is not sufficient reason for denying respondent its right to conduct discovery and have a fair trial. Furthermore, the suggested procedure would not necessarily "prolong" discovery or subject the witnesses to more than one interview; if it were discovered that the witnesses were not improperly influenced, the interviews could enter the areas of the witnesses' anticipated testimony and continue in the presence of complaint counsel who could be available to participate at that point.

Not only are "controlling questions" of law and policy involved, but to respondent's counsel's knowledge, they are presented as a matter of first impression.

Does complaint counsel have the absolute right (as they assert; see p. 3 supra) to be present at all interviews held with their prospective witnesses, including those where the witnesses themselves are willing to see respondent's counsel in the absence of complaint counsel? If not, what instructions may complaint counsel properly give to their witnesses concerning the granting of ex parte interviews and still avoid infringing respondent's right to a fair trial?

The orders of March 23rd and April 5th have denied respondent an opportunity to discover whether complaint counsel unfairly influenced their witnesses, thereby depriving respondent the benefit of ex parte interviews, and, hence, a fair trial. "Controlling questions" of law and policy are present and the Commission should be permitted to rule upon them.

Moreover, subsequent review will be an inadequate remedy. Respondent is now entitled to effective, unencumbered preparation of its case at the pre-trial stage. If respondent is required to proceed, and it is held on review or on appeal (if that becomes necessary) that respondent's fundamental rights were denied, and the case is remanded or set aside, this entire proceeding will have been for naught. Thus, not only will it be unfair to subject respondent and the

Commission to the prolonged continuation of this matter, which will involve a tremendous expenditure of time and money, but the enormous effort put into this proceeding by the Commission for so many years will be unnecessarily wasted. Justice and fairness require that this matter now be resolved since subsequent review will be neither an adequate remedy for respondent nor in the public interest.*

Beyond that, a determination now will create the policy to be followed by complaint counsel in all future Commission proceedings. A policy question of this nature should be answered without delay.

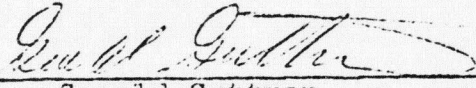
Conclusion

In view of the foregoing, a determination should be made permitting an interlocutory appeal.

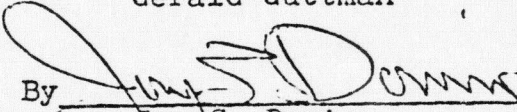
Respectfully submitted,

WEIL, GUTTMAN & DAVIS

By


Gerald Guttman

By


Jay S. Davis
Attorneys for Respondent
Bristol-Myers Company
Office and P. O. Address
60 East 42nd Street
New York, New York 10017

Dated: New York, New York
April 15, 1976

*Additionally, a decision by the Commission at this time will materially advance the ultimate determination of this litigation as it will permit the trial to proceed in an orderly fashion, rather than having it possibly delayed by other appeals or appellate review.

Exhibit VIII

-177a-

Exhibit VII

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

_____)
In the Matter of)
)
BRISTOL-MYERS COMPANY,)
a corporation,)
TED BATES & COMPANY, INC.,)
a corporation, and)
YOUNG & RUBICAM, INC.,)
a corporation.)
_____)

DOCKET NO. 8917

To: Honorable Montgomery K. Hyun
Administrative Law Judge

RESPONSE TO RESPONDENT'S REQUEST FOR PERMISSION
TO FILE AN INTERLOCUTORY APPEAL FROM THE
ADMINISTRATIVE LAW JUDGE'S RULINGS

This is in response to respondent Bristol-Myers' request for permission to file with the Commission an interlocutory appeal of two of the Judge's orders. Complaint counsel oppose the request on the ground that Bristol-Myers has failed to meet the prerequisites for such permission.

Under Section 3.23(b) of the Commission's Rules of Practice, applications for appeal may be allowed only when the Judge has determined that the ruling being challenged "involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." Here, however, the rulings

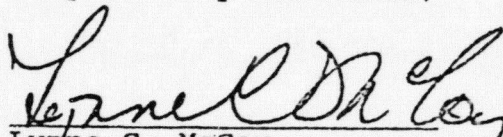
being challenged involve simple discovery requests, and, as the Commission has noted on more than one occasion, issues concerning discovery and procedure will not be disturbed, absent unusual circumstances or a clear abuse of discretion. Koppers Co., Inc., 74, FTC 1574, 1576 (1968); Marlo Furniture Co., 73 FTC 1250, 1251 (1967); Topps Chewing Gum, Inc., 63 FTC 2196 (1963).

Furthermore, despite the respondent's unsubstantiated assertion, the question whether or not the requested subpoenas should be granted is far from a "controlling question of law or policy." It in no way can affect the ultimate outcome of the litigation, for the mere presence of complaint counsel at the interview of its witnesses will not prejudice the respondent's preparation of its defense, which is the only real issue of substance raised by this whole matter. Moreover, immediate appeal will clearly not advance the ultimate termination and subsequent review will be an adequate remedy. Hence, complaint counsel urge that the respondent's request be denied.

As to the merits of the underlying issue, complaint counsel reiterate the arguments made in our earlier Answer in Opposition dated April 9, 1976. Furthermore, we again move to strike, on the grounds set forth in our April 9, 1976 Motion to Strike, Bristol-Myers' renewed references to concrete "evidence" of complaint counsel's improper conduct. It should

be pointed out again that the respondent has not adduced one iota of evidence to support its allegation other than its scandalous references to evidence which it refuses to produce and allow to be openly examined.

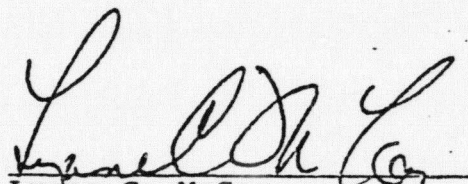
Respectfully submitted,


Lynne C. McCoy
Complaint Counsel

April 20, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all other parties to this proceeding by hand delivery of the original and requisite number of copies to the Office of the Secretary, Federal Trade Commission, and by mailing copies thereof to counsel for all respondents.


Lynne C. McCoy
Complaint Counsel

April 20, 1976

Exhibit IX

-181a-

Exhibit IX

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation,
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

To: The Federal Trade Commission

PETITION FOR DISCRETIONARY
REVIEW BY THE COMMISSION

Respondent, Bristol-Myers Company, petitions the Commission for an expeditious review of orders dated March 23, 1976, April 5, 1976 and April 20, 1976, and of certain permission granted to complaint counsel by the administrative law judge (ALJ), as they raise the very serious issue of a denial of due process resulting from the ALJ's error of law and abuse of discretion in (1) denying respondent the opportunity to discover whether actions of complaint counsel¹

¹ By "complaint counsel" respondent refers to those in dockets numbered 8918 and 8919 as well as 8917. Due to intended use of some of the prospective witnesses in more than one proceeding, and some overlap of activities by at least one, possibly more, of them from one proceeding to another, discovery would not be adequate if confined to only the complaint counsel in docket numbered 8917.

have improperly biased their prospective witnesses against willingly granting ex parte interviews to respondent's counsel, and (2) refusing to determine that an interlocutory appeal from such denial was justified.

Respondent now seeks the Commission's approval of the issuance of the discovery subpoenas ad testificandum and duces tecum that were denied by the aforementioned orders.

Précis

Respondent has a fundamental right to interview complaint counsel's prospective witnesses in the absence of complaint counsel if the witnesses are willing. Complaint counsel, on the other hand, assert that they have an absolute "right to be present" during respondent's counsel's interviews with their prospective witnesses.

Respondent has offered to make available to the ALJ for his in camera review² evidence showing that, in some specific instances, at least, complaint counsel's

² Respondent has quite properly refrained from showing its hand to its adversaries in order to preserve the effectiveness of the evidence it already has as a tool in examining complaint counsel and their anticipated witnesses to elicit still further pertinent documents and information.

communications appear to have altered what would otherwise have been some witnesses' own volition to grant ex parte interviews to respondent's counsel. Since such an influencing would, absent adequate corrective measures, deprive respondent of a fair trial, the evidence already possessed fully warrants thorough discovery as to the situation.

The ALJ has denied respondent's applications for the issuance of subpoenas to complaint counsel and has refused to respond to respondent's offer of its above-described evidence on an in camera basis, opining, merely, that it was up to respondent actually and gratuitously to make such a submission without first seeking his permission or acquiescence that it do so. He has suggested no procedure or mechanism by which such a conditional submission might be forced upon him de facto or without presumptuousness.

The ALJ, further, explicitly allowed complaint counsel to contact their prospective witnesses and advise them that they can, if they wish, refuse to be interviewed by respondent's counsel outside the presence of complaint counsel, and to tell them that he, the ALJ, had authorized complaint counsel to tell that to them. (Tr. pp. 387-91, prehearing conference, dated March 3, 1976.)

This petition, therefore, presents the following controlling questions which the ALJ erred in not certifying to the Commission for its review:

(1) Whether complaint counsel have an absolute right to be present during respondent's counsel's interviews with complaint counsel's prospective witnesses when the witnesses themselves would be willing to see respondent's counsel without complaint counsel.

(2) Whether the aforescribed permission given by the ALJ to complaint counsel has the tendency or capacity to improperly influence their witnesses not to grant ex parte interviews to respondent's counsel.³

(3) Whether the ALJ's orders improperly fore-close respondent from discovering whether complaint counsel's actions have unfairly biased their witnesses against seeing respondent's counsel ex parte, hence depriving respondent of its fundamental right to a fair trial unless adequate remedial measures are adopted.

3

A ruling now will also develop guidelines to be followed by complaint counsel in all future Commission proceedings -- a matter, in and of itself, justifying review by the Commission.

(4) Whether the ALJ erred, and abused his discretion, in issuing his above-described orders without taking into consideration, in camera, respondent's proffered evidence.

Background

Complaint counsel, by their witness list dated December 31, 1975, designated 65 experts as prospective witnesses for the forthcoming adjudicative hearings. To prepare for trial, counsel for Bristol-Myers Company contacted a number of them, seeking their voluntary cooperation in providing interviews to discuss their anticipated testimony.

During those communications, a number of witnesses replied that they would be willing to meet with respondent's counsel only if complaint counsel were present. It developed that, at least for some of them, their refusal to permit ex parte interviews apparently was based on advice or instructions received from complaint counsel.

Respondent, therefore, brought the matter to the attention of the ALJ during a prehearing conference on March 3, 1976. Responding to the ALJ's question, complaint

counsel stated, "We think it is really our right to be present at any of these meetings".⁴

The ALJ, referring to respondent's right to interview willing witnesses out of the presence of complaint counsel, ruled:

"... the party calling that expert witness may be present at the interview of that witness provided that is a desire of that expert witness concerned, and Government counsel have my permission to communicate my ruling to your witnesses." (Tr., p. 388.)
(Emphasis added.)⁵

4

Adding,

"In many cases, the witness ... has asked to have us present, and, in fact, in those situations where the witness has not asked us to be present, we have suggested that one of us be present at such meeting. We think it is appropriate and it is our right to be present at any meeting respondent's counsel has with our witnesses. (Tr., pp. 385-86, emphasis added.)

5

The comments of the ALJ preceding that ruling are also pertinent:

"... I have given some thought to this issue. As you say, Ms. McCoy, if this were formal depositions, there is no question all of the parties would have notice and have a right to be there, but this is going to be on a voluntary basis.

As to lay witnesses, I think the general practice is to leave this matter to individual witnesses. He could have counsel of his choice at the time of interview and that counsel may be Commission counsel -- it doesn't matter.

Respondent's counsel noted his position that the ALJ's permission to complaint counsel went too far since any suggestion of that nature would itself inhibit a spon-

(footnote 5 concluded)

Now, as to the -- the same rule should apply to expert witnesses. Our rule we decide on this morning is going to apply to experts for either side. I can understand your desire to be there. I realize that these experts, although they are independent, have been working in close association with you in connection with reviews of documents, literature, and working out the outline of testimony and so forth. I realize that, so that you would want to guard against any surprises, and also would want to know what is going on at these interviews.

On the other hand, with respect to the issues of reasonableness and also the issue of substantial question, a great deal is going to depend on what these experts say and how much weight is to be given to their testimony."

"Now, one way to meet the Opponent's expert testimony, I suppose, is to present an expert of your own who would give contrary expert opinion. Now, that invites numbers game and I am resolved to do everything in my power to prevent that from occurring. In view of that, I think that perhaps the most effective way of meeting Opponent's expert testimony is an opportunity to impeach his credibility and for that purpose I think that an Opponent should be given every reasonable opportunity to pursue that course, including interviews with Opponent's prospective expert witnesses." (Tr.; pp. 387-88.)

taneous reaction of the witness to allow an ex parte interview.⁶ The ALJ acknowledged, "You have a point there, Mr. Weil", but stood, nonetheless, by his ruling. (Tr., pp. 390-91.)

In view of the very real likelihood that complaint counsel's communications to their witnesses, or certain of them, have changed what would otherwise have been the witnesses' unbiased willingness to allow ex parte interviews with respondent's counsel, respondent sought, by application dated March 12, 1976, issuance of subpoenas ad testificandum and subpoenas duces tecum to complaint counsel in

6

"MR. WEIL: Your Honor, just so that the record will be clear -- with regard to your previous ruling that Complaint Counsel could communicate your ruling to the prospective witnesses, I would like the record to note that does give me a problem because I think the mere fact they hear from Complaint Counsel with what Ms. McCoy has described as a 'suggestion', would itself be an inhibition upon them that maybe they better have them there and would influence and bias what might otherwise be their spontaneous approach and attitudes if they simply heard from me and I was requesting an interview. I think it might not occur to them to think I want Complaint Counsel there, but hearing from Complaint Counsel and maybe the tone of voice could very well alter what would have been their own individual approach." (Tr., pp. 389-90.)

the three companion analgesic cases, emphasizing that they were necessary to discover what impact complaint counsel had on their witnesses' decisions not to grant such interviews, and to develop from their memoranda what actually transpired so that an informed determination could be made whether respondent's rights had been prejudiced.

Complaint counsel responded on March 22, 1976, and respondent, by application dated and filed March 26, 1976, sought permission to reply to faulty arguments contained in their papers. Unknown to respondent, however, the ALJ had already issued an order dated March 23, 1976 (received by respondent's counsel March 29, 1976), denying the requested subpoenas. Two principal reasons were given for the denial: (1) respondents had "shown no justification other than a mere suspicion that some witnesses may have been ... [improperly] influenced", and (2) respondents would "be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas".

Because the order was issued prior to receipt by the ALJ of respondent's reply and since not all of the pertinent facts were before him prior to his March 23rd ruling, respondent sought reconsideration by its application dated

April 1, 1976. It pointed out that respondent possessed very real evidence -- not just "mere suspicion" -- that complaint counsel unduly influenced and polluted the situation with a number of witnesses, and it offered to disclose such evidence in camera to the ALJ. It alternatively requested that if the ALJ decided that the information should first be secured directly from the witnesses, that any interviews be held outside the presence of complaint counsel so that they could take place in a "shirt-sleeve" atmosphere where the witnesses could discuss the matter openly and be free to give spontaneous answers to all of counsel's questions, rather than in an environment where the witnesses might be reluctant to discuss the matter as freely.⁷

Nevertheless, by order dated April 5, 1976, the ALJ denied the motion for reconsideration, ruling that: (1) "respondents merely reiterate suspicion ... that complaint counsel improperly instructed the witnesses not to see respondent's counsel unless complaint counsel were present", and (2) respondents' alternative request to have

7

Respondent also remarked that although it was offering an alternative to deposing complaint counsel, the only proper course to follow was to discover the true facts from complaint counsel since they were directly involved in the events and were not mere recipients of the information.

the interviews held without complaint counsel would subject the witnesses to repeated interviews and "needlessly prolong the pre-trial proceedings". Those rulings were made without so much as an allusion to respondent's assurance that it possessed concrete evidence to support its motion for reconsideration or to its proffer of such evidence in camera.

By application dated April 15, 1976, respondent requested, pursuant to §3.23(b) of the Rules of Practice, a determination permitting an interlocutory appeal from the orders of March 23, 1976 and April 5, 1976. It was emphasized that certification was warranted since controlling questions of law and policy -- including ones of first impression -- were involved (see, pp. 4-5, supra) and that subsequent review would be an inadequate remedy.

The ALJ, by order dated April 20, 1976, denied the application for an interlocutory appeal, basing his decision principally on the fact that "it was incumbent upon Bristol-Myers" to submit its evidence of complaint counsel's improper conduct to him, rather than to offer it in camera, and that the procedure he outlined in the March 23, 1976 order would safeguard respondent's rights.⁸

8

Prior to the denial of the interlocutory appeal, complaint counsel moved, by motion dated April 9, 1976, to strike from the motion for reconsideration dated April 1, 1976 certain alleged "scandalous references" to "evidence"

Argument

RESPONDENT HAS BEEN DENIED ITS FUNDAMENTAL RIGHT TO PREPARE ADEQUATELY FOR AND TO RECEIVE A FAIR TRIAL BY THE ORDERS OF MARCH 23, 1976, APRIL 5, 1976 AND APRIL 20, 1976

Respondent has a fundamental right to talk to any prospective witness -- in the absence of complaint counsel -- if the witness is agreeable to it. Any persuasion, advice or instruction by complaint counsel to the contrary or any exerted influence by them to change what would have been a witness's own volition to grant an ex parte interview infringes upon that right.

By having been refused the requested subpoenas, respondent has been foreclosed from discovering what actually took place between complaint counsel and the witnesses. That is prejudicial to and violates respondent's basic rights since no other meaningful avenue exists for developing the true facts as a foundation for seeking such remedial measures as will appear appropriate in the light of those facts.

(footnote 8 concluded)

which respondent contends reflects complaint counsel's inappropriate instructions to their witnesses. Respondent replied on April 21st, one day after issuance of the Order denying the request for interlocutory appeal, and submitted one example of its evidence, attached hereto as Exhibit 1, to show that it possessed real and reasonable substantiation, not just a mere suspicion, to support its motion for reconsideration. Respondent again offered to disclose in camera to the ALJ all of its evidence. Thus far, no decision has been rendered on complaint counsel's motion.

The denial of respondent's alternative request to allow the interviews to proceed initially without complaint counsel's presence to determine what influence, if any, complaint counsel exerted upon the witnesses was similarly unwarranted (pp. 10-11, supra). To hold the interviews with complaint counsel in the same room could obstruct the effort. The witness could be hesitant and reluctant to say anything which would tend to implicate complaint counsel in any wrongful conduct. Even assuming, arguendo, that respondent's suggested procedure would "prolong the pre-trial proceedings" (Order of April 5, 1976), that certainly is not sufficient reason for denying respondent its due process rights to discovery and to a fair trial.

The ALJ's original basis for denying discovery (Order of March 23, 1976) was that respondent had only "a mere suspicion" that some witnesses were improperly influenced (see p. 9, supra). However, when respondent stated that it possessed very real evidence and would make it available to the ALJ for his in camera review, he failed to consider it. That was error. But beyond that, complaint counsel's firm conviction on the record that they had the "right to be present at any of these meetings" (see p. 6, supra) was sufficient, in and of itself, to authorize issuance of the subpoenas, since it is quite reasonable to assume that they would have conveyed that erroneous information to their prospective witnesses.

It was not, as stated by the ALJ, "incumbent upon Bristol-Myers to submit to the Administrative Law Judge any 'evidence' with its motion for reconsideration if it indeed wished the 'evidence' to be considered ..." (Order dated April 20, 1976). Respondent's counsel were not obligated or required to disclose their evidentiary and litigative tools to complaint counsel; it had the right to have them kept in camera before the ALJ. But it would have been presumptuous, if not highly improper, for respondent to have usurped the ALJ's prerogative by attempting to force upon him, by fait accompli, an in camera submission without his prior permission, even if there were a viable mechanism by which it might be done.

The ALJ's further ruling that "the procedure outlined in [his] March 23, 1976 Order is adequate to safeguard respondent's due process rights ..." completely fails to accomplish that objective. He recommends that the interviews with prospective witnesses be held to completion⁹ in complaint counsel's presence and that if any improper in-

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"... Under the circumstances of this case there is no need to subject complaint counsel's expert witnesses to repeated interviews by respondents' counsel."
(Order dated April 5, 1976.)

fluence comes to light, appropriate relief might then be sought.¹⁰ That, however, will not remove the prejudicial effect of complaint counsel's presence during the entire interview or preserve respondent's basic rights.

Thus, even though respondent were to develop that except for complaint counsel's intervention the witness would have been willing to see respondent's counsel ex parte, respondent would nonetheless be compelled to continue his interview as to the merits of the proceeding, sacrificing the secrecy of its planning strategies and work product to complaint counsel who would remain present, or respondent would have to forego and abandon its right to go into the substantive aspects of the witness' testimony in view of the ALJ's provision precluding more than one interview session.

10

"... respondents will be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas, and to move for appropriate relief should any case of improper influence come to light." (Order of March 23, 1976.)

THE ADMINISTRATIVE LAW JUDGE ERRED IN
REFUSING TO PERMIT AN INTERLOCUTORY
APPEAL IN VIEW OF THE CONTROLLING QUES-
TIONS PRESENTED AND THE INADEQUACY OF
THE REMEDY AFFORDED BY SUBSEQUENT REVIEW

Controlling questions are presented, including ones of first impression, which the Commission should rule upon to avoid injustice to respondent (see, pp. 4-5, supra).

Subsequent review would be an inadequate remedy. Respondent is entitled to effective, unencumbered preparation of its case at the pretrial stage. If respondent is required to proceed without that, and it is subsequently held on appeal (if that becomes necessary) that respondent's fundamental rights were denied, and the case is remanded or set aside, this entire lengthy proceeding¹¹ will have been for naught. With that in mind, it is unfair to subject respondent, as well as the Commission, unnecessarily to a continuation of this matter which will inevitably involve an enormous expenditure of time, effort and money. Justice, fairness and sound administrative discretion dictate that this matter be resolved now.

11

Although the complaint herein was issued in February 1973, the Commission had been investigating this matter since at least 1966 and first began its challenge to advertising representations for the products in issue in 1961 (Docket No. 8319).

THE COMMISSION HAS JURISDICTION
OVER THIS PETITION

Although the Commission, under §3.23(b), has delegated to the ALJ the initial determination of whether to deny an interlocutory appeal, the Commission retains the power to review a challenged ruling where it is alleged that a judge has abused his discretion, as is the case here.

That power was recently exercised by the Commission when it reviewed, on the merits, the petition of respondents in Kellogg Co., et al., Docket No. 8883 (order denying application for review, May 29, 1974). Moreover, in this very matter, complaint counsel earlier asserted that the Commission has the authority to review an ALJ's determination pursuant to §3.23(b) (see complaint counsel's petition for the Commission to exercise its discretionary review of the judge's protective order, dated August 7, 1974).

Conclusion

Respondent cannot proceed with the interviews of complaint counsel's prospective witnesses under the conditions imposed by the ALJ since that effectively would deny

the relief sought here, and would deprive respondent of its right to prepare its case adequately for trial.

It is, therefore, respectfully requested that this petition be reviewed expeditiously and that the relief sought be granted.

Dated: New York, New York
May 3, 1976

Respectfully submitted,
WEIL, GUTTMAN & DAVIS

By 
Gerald Guttman
Attorneys for Respondent
Bristol-Myers Company,
Office & P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687 - 8573

THE GENESEE HOSPITAL

An Affiliated Hospital

of

THE UNIVERSITY OF ROCHESTER
SCHOOL OF MEDICINE AND DENTISTRY

224 Alexander Street

Rochester, New York 14607

Rene Menguy, M.D.
Professor of Surgery
Surgeon in chief

March 5, 1976

Mr. Gilbert H. Weil
Weil, Guttman & Davis
60 East 42nd Street
New York, New York 10017

Re: Federal Trade Commission v.
Bristol-Myers Company, et al.,
Docket No. 8917

Dear Mr. Weil:

I am responding to your letter of February 11, 1976, letter in which you requested an interview concerning testimony that I might give during the forthcoming hearing involving your client, Bristol-Myers Co., et al. I have consulted with Ms. Lynne C. McCoy representing the Federal Trade Commission. She has advised me that I may grant you this interview provided that one of the Federal Trade Commission's attorneys be present. May I suggest that you coordinate this interview with the aforementioned proviso in mind. May I suggest the following dates: 4/19, 4/20, 4/23 or 4/26/76.

In your letter you suggest that the interview might take from one-half to a full day. I can't think of any topic on this Earth that would take that long to discuss! Anyway, I don't have that much time. You will have to be satisfied with less. May I suggest 1-1/2 to 2 hours?

Sincerely yours,

R. Menguy
Rene Menguy, M.D.

RM:md

CC Ms. McCoy

Exhibit 1

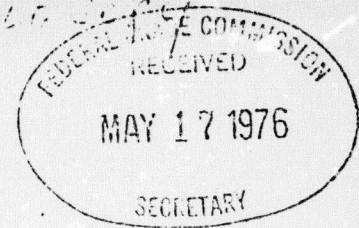
-200a-

Exhibit X

-201a-

Exhibit X

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
)
BRISTOL-MYERS COMPANY,)
)
a corporation, and)
TED BATES & COMPANY, INC.,)
)
a corporation, and)
YOUNG & RUBICAM, INC.,)
)
a corporation.)
)

DOCKET NO. 8917

TC: The Federal Trade Commission

Complaint Counsel's Reply to Bristol-Myers' Petition for
Discretionary Review by the Commission

This reply is filed in opposition to Bristol-Myers' "Petition for Discretionary Review by the Commission," dated May 3, 1976. In that Petition, Bristol-Myers seeks review of three orders of Administrative Law Judge Montgomery K. Hyun. The first two orders denied respondent's requests to conduct what the Administrative Law Judge characterized as an "on-the-record inquisition ... of ... complaint counsel" 1/ in the three analgesic cases, 2/ while the third denied the company's request to take an interlocutory appeal from those orders to the Commission under Section 3.23(b) of the Commission's Rules - an appeal which Bristol-Myers now attempts to take, without authorization.

Despite all the rhetoric contained in Bristol-Myers' Petition, the only real question actually presented therein is simple and involves a mere procedural issue, namely: should the Commission overturn two reasoned orders of the Administrative Law Judge in which he refused to issue harassing

1/ Order of the Administrative Law Judge dated March 23, 1976.

2/ The subpoenas were directed to complaint counsel in American Home Products Corporation (Docket No. 8918) and Sterling Drug (Docket No. 8919); as well as complaint counsel in the Bristol-Myers case.

subpoenas ad testificandum and subpoenas duces tecum to complaint counsel in the three analgesics cases? We submit that neither of the Administrative Law Judge's rulings on this question involves a "controlling question of law or policy," nor do they meet the additional requirements of Section 3.23(b) which are necessary prerequisites for taking an authorized appeal under that section and which must, a fortiori, also be the prerequisites for an unauthorized appeal. Therefore, the Petition should be denied. However, should the Commission decide to reach the merits of this unauthorized appeal, as it recently did in Kellogg Company, et al., Docket No. 8883 (Order of May 29, 1974), we submit that it must affirm the Judge's rulings because there is not a scintilla of evidence that any of those rulings involves a "clear abuse of discretion" 3/ or, for that matter, any abuse at all.

We now turn to a concise examination of the facts which led up to this Petition. Following that, we will show that the Petition should be denied or, in the event that the Commission decides to reach the merits of this issue, that the rulings of the Administrative Law Judge should be affirmed.

I. The Facts

At a pre-hearing conference on March 3, 1976, the Administrative Law Judge ruled that the expert witnesses on our Witness List were entitled, if they so desired, to have complaint counsel attend voluntary pre-trial interviews with respondent's counsel (Tr. at 388). 4/ In addition, on two occasions he expressly authorized complaint counsel to communicate that ruling to our experts (Tr. at 388 and 391).

3/ Missouri Portland Cement Company, 77 FTC 1643 (1970).

4/ He also stated that the same ruling would apply to our interviews with respondents' experts and noted that if formal depositions were held (rather than voluntary interviews in lieu of depositions), all parties would have a right to be present. (Tr. at 387.)

On March 12, 1976, following the pre-hearing conference, Bristol-Myers applied for issuance of subpoenas ad testificandum and subpoenas duces tecum to all complaint counsel in the three "analgesic cases". 5/ These subpoenas sought

all communications to or from any of the witnesses designated on the Witness List in Docket No. 8917, and all records, including but not limited to, notes memoranda and interview reports, of any conversation held with any of such witnesses which relate in any manner to the subject of engaging in interviews with any of respondents' counsel.

In their application, the respondents claimed that issuance of the subpoenas was necessary so that they might find out whether

complaint counsel's communications with such witnesses ... may not have so altered what would otherwise have been their unbiased willingness [to grant ex parte interviews] as to deprive respondents prejudicially of the benefit of those ex parte interviews and, hence, of a fair trial.

On March 23, 1976, the Administrative Law Judge properly denied respondents' application for the subpoenas, ruling that the request was based solely on the respondents' "mere suspicion" and was

in effect an attempt to conduct an on-the-record inquisition to determine whether any of the complaint counsel has improperly influenced any of the witnesses by his or her contacts and communications with a prospective witness..... In my view, respondents have utterly failed to justify the need for such an inquisition at this time.

5/ These subpoenas were separate and distinct from a number of other discovery subpoenas for which respondents filed application.

He also noted that

respondents will be free to ascertain from any individual witnesses at the interviews the information they now seek thorough subpoenas, and to move for appropriate relief should any case of improper influence come to light. (Emphasis added).

On April 1, 1976, respondents moved for reconsideration of the March 23 Order on the ground that they possessed "very substantial evidence that complaint counsel had exceeded the guidelines [set forth in the pre-hearing conference] and polluted the situation with a number of witnesses;" however, they refused to turn over their "evidence" but rather offered to submit it to the Administrative Law Judge, in camera, upon his request. In addition, in their Motion respondents tried a new tack, namely, they asked the Judge to enter an order requiring our experts to submit to ex parte interviews with respondents' counsel concerning the issue of "improper influence". 6/ On April 5, 1976 the Judge again refused to issue the subpoenas, ruling that respondents' motion for reconsideration merely reiterated their "suspicions" of improper influence and did not raise any question or argument not already considered by him at the time of his original ruling. In addition, he rightfully refused to order our experts to submit to ex parte interviews because such a procedure would only subject our expert witnesses "to repeated interviews by respondents' counsel. Furthermore, such a proceeding will needlessly prolong the pre-trial proceedings and should be avoided."

On April 15 Bristol-Myers filed a "Request for a Determination Permitting an Interlocutory Appeal from the Order's of March 23, 1976 and April 5, 1976." In it, the company charged that the first two orders had somehow "denied [it] the right to adequately prepare for and receive a fair trial," and they chastised the Judge for not requesting and examining, in camera, the so-called "evidence" of our alleged improper conduct. On April 20, the Judge refused to permit Bristol-

6/ Respondents apparently envisaged a "two stage" interviewing process. The "first stage" would involve the ex parte interviews relating solely to the issue of "improper influence." Then, after the passage of some time (and, presumably, after the filing of a number of motions), respondents would interview our witnesses concerning their anticipated testimony in this case, which, of course, is what the voluntary interview process was designed to elicit.

Myers to take an interlocutory appeal, ruling that the company had failed "to satisfy the requirements set forth in Section 3.23(b) of the Rules for a favorable determination permitting an interlocutory appeal." With respect to the "evidence" which Bristol-Myers had offered to disclose in camera, he wrote that

it was incumbent upon Bristol-Myers to submit to the Administrative Law Judge any "evidence" with its motion for reconsideration if it indeed wished the "evidence" to be considered in conjunction with its motion. Since Bristol-Myers chose not to do so, the Administrative Law Judge correctly disposed of the reconsideration motion on the basis of the papers then before him.

Finally, he reiterated the reasoned, balanced approach he had adopted since the time of the March 3 prehearing conference, when the issues of "ex parte interviews" and "improper influence" first arose:

It is my intention to accord respondent all due process consistent with the requirements of an expeditious hearing. In my view, the procedure outlined in my March 23, 1976 Order is adequate to safeguard respondent's due process rights with respect to pre-trial discovery regarding anticipated testimony of complaint counsel's expert witnesses, including respondent's right to interview complaint counsel's prospective expert witnesses. As pointed out at the March 3, 1976 prehearing conference, under the Commission's Rules of Practice, complaint counsel would have a right to be present at any deposition of any of their witnesses being taken by Bristol-Myers, a rule in accord with federal court practice. In these circumstances, to expend valuable trial preparation time in collateral proceedings of this type in the name of due process would be carrying a good thing too far and is unwarranted.

Bristol-Myers, having thus lost the procedural battle before the Administrative Law Judge three times, then followed with the instant unauthorized petition to the Commission.

II. The Petition Should Be Denied

An authorized interlocutory review by the Commission can only be sought after a determination by the Administrative Law Judge that his ruling involves a

controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. (Section 3.23(b) of the Commission's Rules).

Clearly, Bristol-Myers must also meet these same requirements before the Commission will accept its unauthorized appeal.

However, upon examination of the facts which led up to this Petition, it is evident that Bristol-Myers has met none of the requirements of Section 3.23(b). First, the question whether or not the requested subpoenas should be granted is far from a "controlling question of law or policy." It can in no way affect the ultimate outcome of the litigation, for the mere presence of complaint counsel at the interviews of our own witnesses will not prejudice Bristol-Myers' preparation of its defense. 7/ Second, there has been no showing - nor could there be - that issuance of the subpoenas will in any way advance the ultimate termination of this litigation; indeed, it would surely have the opposite effect and would prolong this already-lengthy

7/ It should be noted that respondents in a companion analgesic case, American Home Products Corporation, have already conducted interviews with numerous witnesses of complaint counsel in that case. In each instance, complaint counsel have been present. They have also worked closely with counsel for American Home to set up mutually 'convenient' times for the interviews.

proceeding. 8/ And third, subsequent review clearly will be an adequate remedy. In fact, the Judge's Order of March 23, discussed above, specifically advised Bristol-Myers that it had the right "to move for appropriate relief should any case of improper influence come to light" during its interviews with our witnesses.

Since Bristol-Myers has met none of the criteria set forth in Section 3.23(b), its unauthorized petition should be denied.

III. If the Petition is Reviewed on the Merits, the Rulings of the Administrative Law Judge Should be Affirmed

It is well established that the Commission will not disturb a ruling of an Administrative Law Judge unless it is shown that there has been a clear abuse of discretion. Missouri Portland Cement Co., supra; Kellogg Co., supra. And, as the Commission has noted on a number of occasions, this is particularly true where, as here, simple discovery requests or mere procedural questions are involved. Koppers Co., Inc., 74 FTC 1574, 1576 (1968); Marlo Furniture Co., 73 FTC 1250, 1251 (1967); Topps Chewing Gum, Inc., 63 FTC 2196 (1963).

In the instant case, it should be obvious that Judge Hyun's rulings do not constitute a clear abuse of his discretion on his part and, in fact, do not constitute any abuse of discretion at all. Rather, he has simply entered reasonable orders designed to control the proceedings before him. In doing so he has insured that the rights of both sides to this controversy are fully protected - i.e., he has insured that complaint counsel are protected from an "inquisition" by Bristol-Myers which is founded on either "mere suspicions" or "evidence" which the company refuses to produce, while at the same time he has insured that Bristol-Myers will be fully protected from any "improper influences" of complaint counsel if they later come to light.

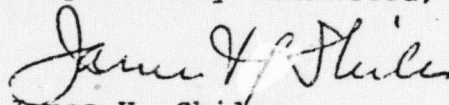
8/ On May 12, 1976, respondents filed for an extension of time to complete their discovery in this case. One of the grounds advanced in support of their motion was that they cannot proceed with interviewing the witnesses on our Witness List until the issue of the subpoenas to complaint counsel is "finally determined." Of course, at the time their request for an extension of time was filed, the issue had already been "finally determined" by the Administrative Law Judge on three separate occasions.

Therefore, if the Commission does reach the merits of Bristol-Myer's Petition, Judge Hyun's rulings should be affirmed.

Conclusion

For the foregoing reasons, complaint counsel respectfully request that Bristol-Myers' Petition be denied. If, however, the Commission determines to review the Petition on the merits, we respectfully request that the rulings of the Administrative Law Judge be affirmed.

Respectfully submitted,



James H. Skiles
Complaint Counsel

DATED: May 17, 1976

CERTIFICATE OF SERVICE

I certify that on the 17th day of May, 1976,
I served the foregoing document by hand delivering
the requisite number of copies to the Secretary of
the Federal Trade Commission and by mailing copies,
first class postage prepaid to Gerald Guttman, Esquire,
Gilbert Weil, Esquire, Sidney Rosdeitcher, Esquire,
Ronald Meister, Esquire, Marshall Cox, Esquire and
Gerald Brown, Esquire.



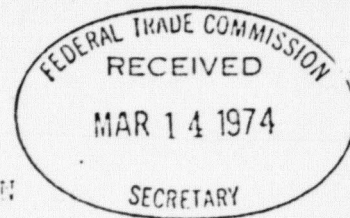
James H. Skiles

Exhibit XI

-211a-

Exhibit XI

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

PREHEARING ORDER
SETTING FORTH THE ISSUES

Complaint counsel and respondents have submitted a Joint Statement of Relevant and Material Facts Which Are Uncontested, a Composite Statement of Contested Issues of Ultimate Fact and of Contested Issues of Mixed Fact and Law, a Composite Statement of the Contested Issues of Law, and a Composite Statement of Issues Raised by Respondents' Affirmative Defenses. These documents set forth either issues upon which the parties have agreed, or, in certain cases, the parties' differing versions of a certain issue or disagreement as to whether a particular matter is in issue at all. In addition, respondents have separately submitted a Statement of Additional Relevant and Material Facts Which Are Uncontested. The respective parties have submitted memoranda setting forth their arguments as to the proper issues of this case and arguments were heard on this subject at the prehearing conference on February 7, 1974. Having considered all the documents and arguments,

IT IS ORDERED that the following are the facts and issues which are relevant to the complaint and answers and shall form a basis for the receipt of evidence and argument in this case.

RELEVANT AND MATERIAL FACTS
WHICH ARE UNCONTESTED

- 1.(a) Respondent Bristol-Myers is a Delaware corporation with its principal place of business located at 340 Park Avenue, New York, New York.
 - (b) Respondent Ted Bates & Company is a New York corporation with its principal place of business located at 1515 Broadway, New York, New York.
 - (c) Respondent Young & Rubicam International, Inc., is a New York corporation with its principal place of business located at 285 Madison Avenue, New York, New York.
- 2.(a) Bristol-Myers has been and is now manufacturing, advertising, offering for sale, selling and distributing the "drugs" Bufferin, Excedrin and Excedrin P.M.
 - (b) Ted Bates & Company, Inc. and Young & Rubicam have been and are now advertising agencies of Bristol-Myers, and have assisted and now assist Bristol-Myers in the preparation, placing for publication, and dissemination of advertisements, Ted Bates to promote the sale of Bufferin, and Young & Rubicam to promote the sale of Excedrin and Excedrin P.M.
3. The active ingredients of the "drugs" Bufferin, Excedrin and Excedrin P.M. are as follows:
 - (a) Bufferin
Aspirin (Acetylsalicylic Acid)
Aluminum Glycinate
Magnesium Carbonate

- (b) Excedrin
Aspirin (Acetylsalicylic Acid)
Salicylamide
Acetaminophen
Caffeine
 - (c) Excedrin P.M.
Aspirin (Acetylsalicylic Acid)
Salicylamide
Acetaminophen
Methapyrilene Fumarate
4. Bristol-Myers has been and is now engaged in a substantial course of trade and a substantial volume of business in the above three "drugs" in interstate commerce and has been and is now in substantial competition with other manufacturers and sellers of "drugs" of the same general kind and nature.
- 5.(a) Bristol-Myers has disseminated and caused the dissemination of certain advertisements by mail and in commerce, by means of magazines, newspapers and television for Bufferin, Excedrin and Excedrin P.M., and by means of radio for Bufferin and Excedrin, including the television commercials specified in Paragraph Six of the complaint.
- (b) Respondents Ted Bates & Company, Inc., in regard to Bufferin, and Young & Rubicam International, Inc., in regard to Excedrin and Excedrin P.M., in their role as advertising agencies helped create, prepare and disseminate the advertising for Bufferin, Excedrin and Excedrin P.M. referred to in the complaint.
- (c) Insofar as Ted Bates alone is concerned certain advertisements for Bufferin have included language similar to that quoted in subparagraphs (A)(1) through (7) of Paragraph Six of the complaint.
6. The purpose of the dissemination of the advertisements for Bufferin, Excedrin and Excedrin P.M. was to induce the purchase of said "drugs".
7. The advertisements for Bufferin, Excedrin and Excedrin P.M., were likely to induce, directly or indirectly, the purchase of said "drugs".

8. Some of the challenged advertisements represented,
- (a) That Bufferin relieves pain faster than plain or simple aspirin relieves pain.
 - (b) That Bufferin will cause upset stomachs less frequently than plain or simple aspirin.
 - (c) That Excedrin is a more effective pain reliever than aspirin tablets.
- 9.(a) The challenged advertisements did not affirmatively state the existence of a substantial question as to the validity of any alleged representation.
- (b) The challenged advertisements did not affirmatively state the existence of a substantial question concerning the validity, significance or interpretation of the tests or studies referred to in Paragraph Fourteen of the complaint.
10. Aspirin and caffeine are well-known, commonplace substances, widely available in many products.
11. The substance referred to in advertisements for Excedrin P.M. allegedly as a special sedative or sleep-inducing agent is methapyrilene fumarate, an antihistamine which is available in several other non-prescription preparations.
12. Ted Bates knew that aspirin is a well-known, commonplace substance, widely available in many products.
13. Young & Rubicam knew that aspirin and caffeine are well-known, commonplace substances, widely available in many products.

CONTESTED ISSUES OF ULTIMATE FACT AND
CONTESTED ISSUES OF MIXED LAW AND FACT

1. Whether the statements and representations alleged in Paragraph 6 of the Complaint are typical of the statements and representations made in advertising for Bufferin, Excedrin and Excedrin P.M. (Compl. 10)

2. Whether the challenged advertisements represented that:

- (a) Bufferin, in fact, relieves pain faster than aspirin relieves pain; 1/
- (b) Bufferin, in fact, relieves pain twice as fast as aspirin relieves pain;
- (c) A recommended dose of Bufferin, in fact, relieves twice as much pain as a recommended dose of aspirin will relieve;
- (d) Bufferin, in fact, will not upset a person's stomach;
- (e) Bufferin, in fact, will upset a person's stomach less frequently than aspirin; 1/
- (f) A recommended dose of Excedrin, in fact, relieves more pain than a recommended dose of aspirin or any other non-prescription internal analgesic will relieve;
- (g) A recommended dose of Excedrin, in fact, relieves twice as much pain as a recommended dose of aspirin will relieve;
- (h) Excedrin, in fact, relieves pain for a longer period of time than a recommended dose of aspirin or any other non-prescription internal analgesic;

1/ Respondents have admitted that the challenged advertisements represent with respect to claims (a), (e) and (k) in paragraph 2 that Bufferin relieves pain faster than plain or simple aspirin relieves pain; Bufferin will cause upset stomachs less frequently than plain or simple aspirin; Excedrin is a more effective pain reliever than aspirin tablets, respectively. (Bristol Myers' Answ., 47; Young & Rubicam's Answ., 48; Ted Bates' Answ., 49.)

- (i) Excedrin, in fact, relieves pain faster than aspirin or any other non-prescription internal analgesic relieves pain;
- (j) Excedrin, in fact, reduces fever more effectively than aspirin;
- (k) Excedrin, in fact, is a more effective pain reliever than aspirin or any other non-prescription internal analgesic; 2/
- (l) Excedrin, in fact, is a more effective pain reliever than aspirin or any other non-prescription internal analgesic because it contains four active ingredients;
- (m) A recommended dose of Excedrin PM, in fact, will relieve more pain than a recommended dose of aspirin;
- (n) A recommended dose of Excedrin PM, in fact, is more effective for the relief of pain which occurs during the night than a recommended dose of aspirin or any other non-prescription analgesic;
- (o) Excedrin PM, in fact, is a more effective pain reliever than aspirin because it contains three analgesic ingredients; (Compl. 79)

And that

- (p) The scientific tests or studies referred to in the challenged advertising prove claims that Bufferin, in fact, is twice as fast and twice as strong as aspirin in relieving pain;
- (q) The scientific tests or studies referred to in the challenged advertising prove claims that Excedrin, in fact, is more than twice as strong as and more effective than aspirin in relieving pain; (Compl. 714)

2/ See footnote 1 above.

And that

- (r) Bufferin, in fact, relieves nervous tension, anxiety and irritability and will enable persons to cope with the ordinary stresses of everyday life;
- (s) Excedrin and Excedrin PM, in fact, relieve nervous tension, anxiety and irritability and will enable persons to cope with the ordinary stresses of everyday life;
- (t) Excedrin PM, in fact, is an effective mild sedative; (Compl. T12)

And that

- (u) Physicians, in fact, recommend Bufferin more than any other non-prescription internal analgesic products; (Compl. T17)

And that

- (v) The analgesic ingredient in Bufferin, in fact, is other than ordinary aspirin;
- (w) The ingredient giving "longlasting relief" in Excedrin, in fact, is other than ordinary aspirin;
- (x) The "anti-depressant" in Excedrin, in fact, is other than caffeine; (Compl. T21)

And that

- (y) Excedrin PM, in fact, contains a special sedative or sleep-inducing agent available only in Excedrin PM. (Compl. T23)

3. Whether the challenged advertisements represented that the representations in paragraph 2 (a-o) above have been established. (Compl. T7)

4. Whether the representations in paragraph 3 above, if made, have in fact been established. (Compl. T3)

5. Whether there existed, at the time the representations in paragraph 2 (a-o) and (p-q) above allegedly were made, a substantial question recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs,

- (a) as to the validity of the representations in paragraph 2 (a-o) above; and
- (b) concerning the validity, significance, or interpretation of the tests referred to in the representations in paragraph 2 (p-q) above as they relate to such representations. (Compl. ¶¶ 10, 15)

6. Whether the failure to affirmatively disclose in the challenged advertisements the existence of a substantial question,

- (a) as to the validity of the alleged representations in paragraph 2 (a-o) above, and
- (b) as to the validity, significance, or interpretation of the tests as they relate to the alleged representations in paragraph 2 (p-q) above,

fails to reveal a material fact which, if known to consumers, would be likely to affect their determination of whether or not to purchase such products, and whether it thereby results in such advertisements being "false advertisements" within the meaning of §12 of the F.T.C. Act. (Compl. ¶¶ 11, 16, 25)

- 7. (a) Whether at the time the representations in paragraph 2 (r-t) and 2 (u) above allegedly were made, respondents lacked competent and reliable scientific evidence to support the representations in paragraph 2 (r-t) above and competent and reliable evidence to support the representation in paragraph 2 (u) above, and
- (b) Whether possession of such evidence is necessary in order for there to be a reasonable basis for the above representations; and if so, whether lack of such reasonable basis would constitute an unfair act or practice under FTCA §5 (a)(1). (Compl. ¶¶ 13, 18)

8. Whether, if the representations in paragraphs 2 (v-x) above were made, as alleged,

- (a) the analgesic ingredient in Bufferin is ordinary aspirin;
- (b) the Excedrin ingredient represented as giving "long lasting relief" in the representation in paragraph 2(w) above is ordinary aspirin; and
- (c) the Excedrin ingredient represented to be an "anti-depressant" in the representation in paragraph 2(x) above is caffeine. (Compl. ¶22)

9. (a) Whether Bristol-Myers marketed and advertised Bufferin, Excedrin and Excedrin PM without disclosing in media advertising for such products that such products contain aspirin and that Excedrin contains caffeine (Compl. ¶19); and, if so,
- (b) Whether the use of aspirin or caffeine may be injurious to health and cause undesirable side effects (Compl. ¶20); and, if so,
- (c) Whether a substantial number of certain consumers do not know that Bufferin, Excedrin and Excedrin PM contain aspirin and that Excedrin contains caffeine (Compl. ¶20); and, if so,
- (d) Whether the failure to affirmatively disclose in the challenged advertisements that Bufferin, Excedrin and Excedrin PM contain aspirin and that Excedrin contains caffeine fails to reveal material facts, which if known to certain consumers, would be likely to affect their determination of whether or not to purchase such products, and whether it thereby results in such advertisements being "false advertisements" within the meaning of §12 of the F.T.C. Act. (Compl. ¶¶20, 25)

10. Whether the alleged use by respondents of deceptive representations and false advertisements as set forth in the complaint has the tendency and capacity to mislead consumers into the erroneous and mistaken belief that those representations are true, and into the purchase of substantial quantities of those drugs by reason of that belief. (Compl. 327)

11. (a) Whether the relief proposed in the notice order bears a reasonable relationship to respondents' violations, as alleged, and is calculated to remedy the violations, and their effects.
- (b) Whether any residual effects which have a tendency and capacity to injure consumers and/or competitors exist from the allegedly false, misleading and deceptive advertising of the types addressed in subdivisions (1), (2) and (3) of section VII of the notice order (Notice Order, section VII).
- (c) Whether such residual effects, if any, are of the degree, nature and kind which require or warrant "correcting" of the nature and extent proposed in section VII of the notice order.
- (d) Whether the effect of the specific form, content and media schedules of the "corrective advertising" that would be imposed upon respondent Bristol-Myers by a final order will not exceed what is necessary to "correct" the residual effects of such prior false, misleading and deceptive advertising of the types addressed in section VII (1), (2) and (3) of the notice order as shall have been proven to have been engaged in by Bristol-Myers, and will not be punitive to Bristol-Myers, or have a tendency and capacity to mislead or confuse a substantial portion of the public, including the ignorant, the unthinking and the credulous.

Issues Pertaining to Respondent
Advertising Agencies

12. Whether Ted Bates and Young & Rubicam actively and knowingly participated in the alleged deception and unfairness.

13. (a) Whether Young & Rubicam knew, had reason to know or should have known that the validity of the alleged representations in paragraph 2 (f-o), above, had not in fact been established, as alleged. (Compl. 13)
- (b) Whether Ted Bates knew, had reason to know or should have known that the validity of (a-e), above, had not in fact been established, as alleged. (Compl. 18)
14. (a) Whether Young & Rubicam knew, had reason to know or should have known that at the time the alleged representations in paragraph 2 (f-o) and (q), above, were made there existed a substantial question recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs,
- (1) as to the validity of the alleged representations set forth in paragraph 2 (f-o), above; and
- (2) concerning the validity, significance or interpretation of the tests referred to in the alleged representation set forth in paragraph 2 (q), above, as they relate to such representation. (Compl. 1110, 15)
- (b) Whether Ted Bates knew, had reason to know or should have known that at the time the alleged representations set forth in paragraph 2(a-e) and (p), above, were made, there existed a substantial question recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs.

- (1) as to the validity of the alleged representations set forth in paragraph 2 (a-e), above; and
- (2) concerning the validity, significance or interpretation of the tests referred to in the alleged representation set forth in paragraph 2 (p), above, as they relate to such representation.
(Compl. TT 10, 15)

15. (a) Whether Young & Rubican knew, had reason to know or should have known that the existence of a substantial question;

- (1) as to the validity of the alleged representations set forth in paragraph 2 (f-o), above; and
- (2) as to the validity, significance or interpretation of the tests as they relate to the alleged representation set forth in paragraph 2 (q), above,

is a material fact which, if known to consumers, would be likely to affect their determination whether or not to purchase such products.
(Compl. TT 11, 16)

(b) Whether Ted Bates knew, had reason to know or should have known that the existence of a substantial question;

- (1) as to the validity of the alleged representations set forth in paragraph 2 (a-e), above; and
- (2) as to the validity, significance or interpretation of the tests as they relate to the alleged representation set forth in paragraph 2 (p), above,

is a material fact which, if known to consumers, would be likely to affect their determination whether or not to purchase such products.
(Compl. TT 11, 16)

16. (a) Whether Young & Rubicam knew, had reason to know or should have known that at the time the representations set forth in paragraph 2(s-t) above allegedly were made, respondents lacked competent and reliable scientific evidence to support those representations. (Compl. ¶13)
- (b) Whether Ted Bates knew, had reason to know or should have known that at the time the representations set forth in paragraph 2(r) and paragraph 2(u) above allegedly were made, respondents lacked competent and reliable scientific evidence to support the representation paragraph 2(r) above and competent and reliable evidence to support the representation in paragraph 2(u) above. (Compl. ¶¶13, 18)
17. (a) Whether if the representation in paragraph 2(v) above was made, as alleged, Ted Bates knew, had reason to know or should have known that the analgesic ingredient in Bufferin is ordinary aspirin. (Compl. ¶22)
- (b) Whether, if the representations in paragraph 2(w-x) above were made, as alleged, Young & Rubicam knew, had reason to know or should have known that:
- (1) the Excedrin ingredient represented as giving "long lasting relief" in the representation in paragraph 2(w) above is ordinary aspirin; and
- (2) the Excedrin ingredient represented to be an "anti-depressant" in the representation in paragraph 2(x) above is caffeine. (Compl. ¶22)
18. (a) Whether Young & Rubicam knew, had reason to know or should have known that the use of aspirin or caffeine may be injurious to health and cause undesirable side effects, as alleged. (Compl. ¶20)
- (b) Whether Young & Rubicam knew, had reason to know or should have known that a substantial number of certain consumers do not know that Excedrin and Excedrin PM contain aspirin and that Excedrin contains caffeine, as alleged. (Compl. ¶20)

- (c) Whether Ted Bates knew, had reason to know or should have known that a substantial number of certain consumers do not know that Bufferin contains aspirin, as alleged. (Compl. ¶20)
- (d) Whether Young & Rubicam knew, had reason to know or should have known that the facts that Excedrin and Excedrin PM contain aspirin, and that Excedrin contains caffeine, are material facts which if known to certain consumers, would be likely to affect their determination whether or not to purchase such products. (Compl. ¶20)
- (e) Whether Ted Bates knew, had reason to know or should have known that the use of aspirin may be injurious to health and cause undesirable side effects, as alleged. (Compl. ¶20)
- (f) Whether Ted Bates knew, had reason to know or should have known that the fact that Bufferin contains aspirin is a material fact which if known to certain consumers would be likely to affect their determination whether or not to purchase such product. (Compl. ¶20)

19. Whether Young & Rubicam knew, had reason to know or should have known that methapyrilene fumarate is an anti-histamine which is available in other non-prescription preparations. (Compl. ¶24)

20. Whether Ted Bates and Young & Rubicam, in the course and conduct of their businesses as alleged in the Complaint, at all times mentioned in the Complaint, were in substantial competition in commerce with other advertising agencies. (Compl. ¶28)

ISSUES OF LAW

1. Whether making a representation in an advertisement concerning the performance, effectiveness or side effects of a non-prescription internal analgesic when there exists a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug, as to the validity of such representation, is an unfair act or practice in violation of

§5 of the Federal Trade Commission Act (FTCA) as alleged in paragraphs 9 and 10 of the Complaint when:

- (a) there is no allegation that respondents lacked a reasonable basis for making the representation;
- (b) there is no allegation in such paragraphs that the alleged representation is false or deceptive; and
- (c) there is no allegation that respondents represented directly or by implication, that there existed no such substantial question (Compl. ¶¶9-10).

2. Whether making a representation in an advertisement concerning the performance or effectiveness of a non-prescription internal analgesic which makes reference to scientific tests or studies or the results thereof when there exists a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug, as to the validity, significance or interpretation of such tests, is an unfair act or practice in violation of §5 of the FTCA as alleged in paragraphs 14 and 15 of the complaint, when:

- (a) there is no allegation that respondents lacked a reasonable basis for making the representation;
- (b) there is no allegation in such paragraphs that the alleged representation is false or deceptive; and
- (c) there is no allegation that respondents represented directly or by implication that there existed no such substantial question. (Compl. ¶¶14-15)

3. Whether the allegations referred to in paragraph 5 of the CONTESTED ISSUES OF ULTIMATE FACT . . . [etc.] CIF state a violation of the FTCA:

- (a) In the absence of a definition by complaint counsel of the meaning that is intended by such allegations of the term "substantial question" therein; or

- (b) under such definition of the meaning that is intended by such allegations of the term "substantial question" therein as complaint counsel do assert and prove to be applicable.

4. Whether the allegations referred to in paragraphs 3 and 4 of the CIF state a violation of the FTCA:

- (a) in the absence of a definition by complaint counsel of the meaning that is intended by such allegations of the phrase "have been established" therein; or
- (b) under such definition of the meaning that is intended by such allegations of the phrase "have been established" therein as complaint counsel do assert and prove to be applicable.

5. Whether provisions such as appear in sections III A1, D and F, and VIII(1), (2) and (3) of the notice order attached to the complaint are proper:

- (a) in the absence of a definition therein of the meaning that is intended by such provisions of the terms "established" and "substantial question" therein; or
- (b) under such definition of the meaning intended by such provisions of the terms "established" and "substantial question" therein as complaint counsel may assert should be set forth therein.

6. Whether making a representation in an advertisement concerning the performance, effectiveness, side effects or recommendation by physicians of a non-prescription internal analgesic when respondents do not have a reasonable basis in the form of competent and reliable scientific evidence to support the performance or effectiveness and side effects claim, and in the form of competent and reliable evidence to support the claim of recommendation by physicians, is an unfair act or practice in violation of §5 of the FTCA as alleged in paragraphs 12 and 13 and 17 and 18 of the Complaint when:

- (a) there is no allegation that respondents lacked a reasonable basis of any other kind therefor; and
- (b) there is no allegation that the alleged representation is false or deceptive. (Compl. ¶¶12-13, 17-18)

7. Whether the failure to disclose in the challenged advertisements the facts alleged to be material in paragraphs 11, 16 and 20 of the Complaint renders them false and misleading in a material respect in violation of §§5 and 12 of the FTCA. (Compl. ¶¶9, 11, 14, 16, 19, 20, 25)

8. Whether the advertisements referred to in paragraphs 7, 21 and 23 of the Complaint as alleged in paragraphs 3, 22 and 24 of the Complaint constitute false advertisements in violation of §§5 and 12 of the FTCA. (Compl. ¶¶7-8, 21-24, 25)

9. (a) Whether sections I through VII of the notice order have a reasonable relation to such unlawful acts and practices as may be found herein, whether they are proper to prevent a continuation of such unlawful acts and practices, and whether they provide a reasonable remedy against the continuing effects of respondents' past unlawful acts and practices.

(b) Whether section VII of the notice order is beyond the lawful authority of the Commission to impose; or punitive, arbitrary, unreasonable or capricious, especially under the facts and circumstances here involved; and whether it improperly attempts to delegate to others the power to prescribe and impose the operative provisions, terms and conditions of a cease and desist order herein, and would deprive Bristol-Myers of its right to appeal from such provisions, terms and conditions.

(c) Whether the effect of the specific form, content and media schedules of the "corrective advertising" that would be imposed upon respondent Bristol-Myers by a final order will not exceed what is necessary to "correct" the residual effects of such prior false, misleading and deceptive advertising referred to in section VII (1), (2) and (3) of the notice order as shall have been proven to have been engaged in by Bristol-Myers, and will not be punitive to Bristol-Myers, or have a tendency and capacity to mislead or confuse a substantial portion of the public, including the ignorant, the unthinking and the credulous.

(d) Whether section VIII of the notice order is beyond the lawful authority of the Commission to impose or otherwise improper.

Issues of Law Pertaining to
Respondent Advertising Agencies

10. If an advertising agency is presented by the advertiser with substantiation which provides a reasonable basis to support advertising claims challenged by the Commission, and if the agency knows, has reason to know or should know that there exists questions raised by qualified experts as to the validity of such claims,

- (a) Whether the agency has an obligation to make independent inquiries regarding the state of scientific and medical knowledge and opinion pertaining to such claims, and if so,
- (b) Whether that obligation includes the duty to determine whether such questions are substantial.

11. Where advertising claims challenged by the Commission are not alleged to be false or deceptive, and where it is not alleged that the substantiation provided by the advertiser to the advertising agency was insufficient to provide a reasonable basis to support such claims, whether the advertising agency may be held in violation of the Federal Trade Commission Act for having assisted in the preparation and dissemination of advertisements making such claims if it knew, had reason to know, or should have known of the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such claims.

12. Whether an advertising agency can be held in violation of the Federal Trade Commission Act if the specific standards ^{3/} set forth in the complaint by which the Commission proposes to judge the challenged advertising had not been enunciated in a Commission decision, rule, guide or enforcement statement at the time such advertising was prepared and disseminated.

13. Whether challenged advertisements which fail to disclose that the advertised product contains aspirin and/or caffeine, as alleged in paragraphs 19 and 20 of the complaint, can be held to constitute false advertisements in violation of the Federal Trade Commission Act without a finding that such advertisements convey, directly or by implication, a representation contrary to the non-disclosed facts.

^{3/} This legal issue pertains to the "substantial question" and "material facts" paragraphs of the complaint.

Bristol Myers' Affirmative Defenses

1. Whether the provisions of the notice order would
 - (a) directly censor or otherwise exercise governmental control over truthful advertising; or
 - (b) have a chilling effect which would indirectly censor or otherwise exercise governmental control over truthful advertising; or
 - (c) directly or indirectly censor or otherwise exercise governmental control over Bristol-Myers' freedom to express its views, thoughts, opinions or position upon subjects of public interest; or

- (d) impose a form of governmental censorship, regulation and control, beyond merely prohibiting Bristol-Myers from exercising its rights of free expression, by compelling it to disseminate advertising which would be at its own great expense and which would cause injury to its good-will and which advertising would falsely purport to be of its own violation and imprimatur;

and, if so, whether the notice order thereby violates Bristol-Myers' rights under the First Amendment of the United States Constitution.

(Second Affirmative Defense,
¶13 of Bristol-Myers' Answer)

2. Whether section VII of the notice order is beyond the lawful authority of the Commission to impose; or excessively punitive, arbitrary, unreasonable or capricious; and whether it attempts to delegate to a person or persons other than the Federal Trade Commission itself the power to prescribe and impose the operative provisions, terms and conditions of a cease and desist order herein, and, if so, whether it is thereby improper and would thereby deprive Bristol-Myers of its rights to appeal from such provisions, terms and conditions.

(Third Affirmative Defense,
¶¶14-17 of Bristol-Myers' Answer)

3. Whether the notice order would

- (a) deprive a substantial portion of the public of information and advice that can lead to their achievement of greater satisfaction in the course of exercising their due rights of self-medication; or
- (b) cause, or have the tendency and capacity to cause, a substantial portion of the public to be misled or confused into believing that important representations in Bristol-Myers' advertising as to the qualities and performance of the products are untrue when there is no allegation that the products do not possess qualities or perform in the manner as represented in such advertising;

and, if so, whether it is thereby contrary to the public interest.

(Fourth Affirmative Defense,
¶18 of Bristol-Myers' Answer)

4. Whether the complaint fails to state facts constituting a violation of the Federal Trade Commission Act.

(Sixth Affirmative Defense,
¶20 of Bristol-Myers' Answer)

Advertising Agencies' Affirmative Defenses

5. Whether the notice order would prohibit and have a chilling effect on respondent advertising agencies' preparation and dissemination of truthful advertisements and advertising which express respondents' views, thoughts, opinions or positions upon subjects of public interest, and, if so, whether the notice order would thereby violate respondent advertising agencies' rights under the First Amendment of the United States Constitution and whether it thereby is beyond the authority conferred by the Federal Trade Commission Act.

(Young & Rubicam Answer,
First and Second Affirmative
Defense; Ted Bates Answer,
Third Defense)

6. Whether the notice order would require "corrective advertisements" having the tendency to cause a substantial portion of the public to believe that the advertisements challenged in the complaint are false and whether it is not limited to the specific products advertised, and, if so, whether the notice order is thereby not in the public interest and thereby violates respondent advertising agencies' rights under the Fifth Amendment, Section 5 of the Federal Trade Commission Act, and the Administrative Procedure Act.

(Young & Rubicam Answer,
Seventh Affirmative Defense,
¶(a) and (b); Ted Bates Answer,
Seventh Defense)

7. Whether the notice order and this proceeding

- (a) would deprive substantial segments of the public of information and advice which they have a need and a right to know;

(Young & Rubicam Answer,
Third Affirmative Defense,
¶(a); Ted Bates Answer,
Second Defense)

- (b) would impose novel standards for the performance of the activities of an advertising agency which could not be met without undue and unnecessary expense and which would have a detrimental impact upon the advertising industry; and

(Young & Rubicam Answer,
Third Affirmative Defense,
¶(b); Ted Bates Answer,
Sixth Defense)

- (c) would impose, through adjudication, novel standards of conduct for the respondent advertising agencies, which cannot be fairly or prudently imposed through adjudicative proceedings;

and, if so, whether the notice order and this proceeding are thereby not in the public interest.

(Young & Rubicam Answer,
Third Affirmative Defense,
¶(c); Ted Bates Answer,
Sixth Defense)

8. Whether the notice order may be modified without notice or hearing on the basis of record facts developed during the proceeding and whether such modification is not limited to the violations alleged in the Complaint, and, if so, whether it thereby violates respondent advertising agencies' rights under the Fifth Amendment, Section 5(b) of the Federal Trade Commission Act, and the Administrative Procedure Act.

(Young & Rubicam Answer,
Seventh Affirmative Defense,
¶(c); Ted Bates Answer,
Fourth and Fifth Defenses)

9. Whether this proceeding would retroactively punish respondent advertising agencies for acts which, at the time they were committed, did not violate any pre-existing or foreseeable legal standard or whether the complaint is too vague to permit preparation of a defense or to notify

respondent advertising agencies of the standard of conduct allegedly violated, and, if so, whether this proceeding thereby violates the rights of respondent advertising agencies under the Fifth Amendment.

(Young & Rubican Answer,
Fourth and Fifth Affirmative
Defenses; Ted Bates Answer,
Eighth Defense)

10. Whether the respondent advertising agencies acted reasonably on the basis of facts which they knew, had reason to know, or should have known.

(Young & Rubican Answer,
Sixth Affirmative Defense)

11. Whether the complaint fails to state a violation of the Federal Trade Commission Act.

(Young & Rubican Answer,
Eighth Affirmative Defense;
Ted Bates Answer, Ninth
Defense)

In addition, the undersigned, at the prehearing conference held on February 7, 1974, proposed as an additional issue the following:

1. "It is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test data to support it."
(Firestone test approved by court at p. 8)

2. It is both unfair and deceptive to consumers to make a specific advertising claim without substantial competent scientific tests, medical knowledge, publications or expert opinion to support it. (Firestone test paraphrased to correspond to this case)

3. It is both unfair and deceptive to consumers to make a specific advertising claim where substantial competent scientific test data question its validity. (Complaint counsel's test paraphrased for Firestone case)

It is both unfair and inequitable to require an advertiser to meet the Firestone test (first and second standards above), when the advertiser's test, medical knowledge, publications or expert opinion question its validity. (Complaint counsel's test to be used in this case)

Even though an advertiser would be able to meet the Firestone test (first and second standards above), he might still be guilty of an unfair practice under the third and fourth standards set forth above.

ISSUE. Whether an advertiser who meets the Firestone test (first and second standards above) is guilty of an unfair practice if he can not meet the third and fourth tests?

It is the undersigned's belief that this broad issue cuts across the entire case. However, final resolution of the appropriate standard or standards to be applied to determine whether there has been a violation of law will not be made until the conclusion of evidentiary hearings in this matter. However, complaint counsel and respondents will be permitted to discover and present evidence on any of the issues designated herein under the theory of any of the four numbered standards set forth above.

IT IS FURTHER ORDERED that the separate "Respondents' Statement of Additional Relevant and Material Facts Which Are Uncontested" is rejected.

William K. Jackson
William K. Jackson,
Administrative Law Judge.

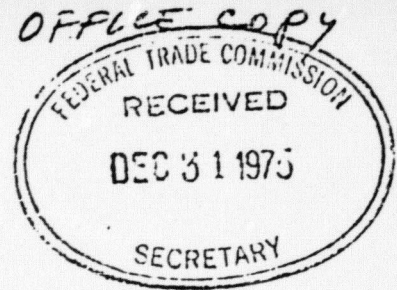
March 13, 1974

Exhibit XII

-236a-

Exhibit XII

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED EMMES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

TO: The Honorable Montgomery K. Hyun
Administrative Law Judge

DOCUMENT LIST

Complaint counsel hereby submit a list of documents and other exhibits which they intend to introduce in evidence at the hearings in this matter.

Pursuant to Section 3.31(a) of the Commission's Rules of Practice, complaint counsel request that the three respondents admit the genuineness and authenticity of the documents listed below. Almost all these documents were supplied to complaint counsel from respondents' files. Those few documents listed below which were not obtained from respondents' files will be supplied to respondents as soon as copies can be made and forwarded so that respondents may evaluate their genuineness and authenticity.

Complaint counsel again point out that this document list has been prepared without the opportunity to review respondents' answers to our Request for Admissions, filed December 5, 1975. While we recognize the magnitude of the task of responding to these requests, we note that it may be necessary for complaint counsel to supplement or amend this document list after such time as respondents' answers to our Requests are received. If such amendment becomes necessary, it will be accomplished as expeditiously as possible.

BUFFERIN ADVERTISEMENTS

Broadcast Advertisements

CX-1 Film of a 30 sec. television advertisement for Bufferin entitled "Camping"; agency code number BUF-15A.

CX-1a Storyboard version of the film advertisement designated CX-1.

CX-2 Film of a 60 sec. television advertisement for Bufferin entitled "Piano Teacher"; agency code number BUF-89A.

CX-2a Storyboard version of the film advertisement designated CX 2.

CX-3 Film of a 60 sec. television advertisement for Bufferin entitled "Piano Teacher-Alt"; agency code number BUF-89AX.

CX-3a Storyboard version of the film advertisement designated CX-3.

CX-4 Film of a 45 sec. television advertisement for Bufferin entitled "Piano Teacher-Alt"; agency code number BUF-93AX.

CX-4a Storyboard version of the film advertisement designated CX-4.

CX-5 Film of a 30 sec. television advertisement for Bufferin entitled "Piano Teacher Revised"; agency code number BMBU 0093.

CX-5a Storyboard version of the film advertisement designated CX-5.

CX-6 Film of a 30 sec. television advertisement for Bufferin entitled "Piano Teacher-Rev. II"; agency code number BMBU 0203.

CX-6a Storyboard version of the film advertisement designated CX-6.

CX-7 Film of a 45 sec. television advertisement for Bufferin entitled "Piano Teacher"; agency code number BUF-93X.

CX-7a Storyboard version of the film advertisement designated CX-7.

CX-8 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Cotton/Big Body"; agency code number 35-60R1.

CX-9 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Francis/Morning Headache"; agency code number 39-60.

CX-10 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Cotten/Headache"; agency code number 31-30A.

CX-11 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Walk in the City"; agency code number 86-69RIC.

CX-12 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Cotten/Headache"; agency code number 31-30B.

CX-13 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Cotten/Headache"; agency code number 31-60R-4.

CX-14 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Cotten/Fireman"; agency code number 55-60.

CX-15 Storyboard version of a 45 sec. television advertisement for Bufferin entitled "Cotten/Fireman"; agency code number 55-45.

CX-16 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "David Niven/Study"; agency code number 69-60.

CX-17 Storyboard version of a 45 sec. television advertisement for Bufferin entitled "Zoo-Alt"; agency code number 78-45P.

CX-18 Storyboard version of a 45 sec. television advertisement for Bufferin entitled "Zoo Alternate with Plastic Tag"; agency code number 79-45PT.

CX-19 Film of a 30 sec. television advertisement for Bufferin entitled "Photographs"; agency code number BUF-105.

CX-19a Storyboard version of the film advertisement designated CX-19.

CX-20 Film of a 30 sec. television advertisement for Bufferin entitled "Hands"; agency code number BUF-19AX.

CX-20a Storyboard version of the film advertisement designated CX-20.

CX-21 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Hands"; agency code number 81-60P.

CX-22 Film of a 30 sec. television advertisement for Bufferin entitled "Half Time/Man"; agency code number BUF-1AX.

CX-22a Storyboard version of the film advertisement designated CX-22.

CX-23 Film of a 45 sec. television advertisement for Bufferin entitled "Bufferin Time/Man"; agency code number BUF-1X.

CX-23a Storyboard version of the film advertisement designated CX-23.

CX-24 Film of a 30 sec. television advertisement for Bufferin entitled "Bufferin Time/Man"; agency code number BUF-3AX.

CX-24a Storyboard version of the film advertisement designated CX-24.

CX-25 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Bufferin Time/Man-Tag"; agency code number BUF-VT-6X.

CX-26 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Bufferin Time/Man-Tag"; agency code number BUF-VT-7X.

CX-27 Film of a 30 sec. television commercial for Bufferin entitled "Bufferin Time/Woman"; agency code number BUF-2X.

CX-27a Storyboard version of the film advertisement designated CX-27.

CX-28 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Bufferin Time/Woman"; agency code number BUF-VT-2X.

CX-29 Film of a 30 sec. television advertisement for Bufferin entitled "Bufferin Time/Woman"; agency code number BUF-4X.

CX-29a Storyboard version of the film advertisement designated CX-29.

CX-30 Film of a 30 sec. television advertisement for Bufferin entitled "Lingerie Sale"; agency code number BUF-10AX.

X-30a storyboard version of the film advertisement designated CX-30.

X-31 Film of a 45 sec. television advertisement for Bufferin entitled "Lingerie Sale"; agency code number BUF-10X.

CX-31a Storyboard version of the film advertisement designated CX-31.

X-32 Film of a 45 sec. television advertisement for Bufferin entitled "Dinner Party"; agency code number BUF-9X.

CX-32a Storyboard version of the film advertisement designated CX-32.

CX-33 Film of a 30 sec. television advertisement for Bufferin entitled "Dinner Party"; agency code number BUF-9AX.

CX-33a Storyboard version of the film advertisement designated CX-33.

CX-34 Film of a 60 sec. television advertisement for Bufferin entitled "Dinner"; agency code number BUF-8X.

CX-34a Storyboard version of the film advertisement designated CX-34.

CX-35 Film of a 45 sec. television advertisement for Bufferin entitled "Beach"; agency code number BUF-12X.

CX-35a Storyboard version of the film advertisement designated CX-35.

CX-36 Film of a 30 sec. television advertisement for Bufferin entitled "Beach"; agency code number BUF-12AX.

CX-36a Storyboard version of the film advertisement designated CX-36.

CX-37 Film of a 30 sec. television advertisement for Bufferin entitled "Moving Day"; agency code number BUF-13AX.

CX-37a Storyboard version of the film advertisement designated CX-37.

CX-38 Film of a 45 sec. television advertisement for Bufferin entitled "Moving Day"; agency code number BUF-13X.

CX-38a Storyboard version of the film advertisement designated CX-38.

CX-39 Film of a 30 sec. television advertisement for Bufferin entitled "Beauty Parlor/Two Clocks"; agency code number BUF-38AX.

CX-39a Storyboard version of the film advertisement designated CX-39.

CX-40 Film of a 30 sec. television advertisement for Bufferin entitled "Woman/Stomach"; agency code number BUF-55X.

CX-40a Storyboard version of the film advertisement designated CX-40.

CX-41 Film of a 30 sec. television advertisement for Bufferin entitled "Woman/Stomach"; agency code number BUF-52X.

CX-41a Storyboard version of the film advertisement designated CX-41.

CX-42 Film of a 30 sec. television advertisement for Bufferin entitled "High Speed Formula/Woman"; agency code number BUF-28AX.

CX-42a Storyboard version of the film advertisement designated CX-42.

CX-43 Film of a 30 sec. television advertisement for Bufferin entitled "Man/Stomach"; agency code number BUF-54X.

CX-43a Storyboard version of the film advertisement designated CX-43.

CX-44 Film of a 30 sec. television advertisement for Bufferin entitled "Stopwatch/Man"; agency code number BUF-68AX.

CX-44a Storyboard version of the film advertisement designated CX-44.

CX-45 Film of a 30 sec. television advertisement for Bufferin entitled "Changing Faces/Music"; agency code number BUF-100.

CX-45a Storyboard version of the film advertisement designated CX-45.

CX-46 Film of a 30 sec. television advertisement for Bufferin entitled "Changing Face-Rev"; agency code number 62AXR.

CX-46a Storyboard version of the film advertisement designated CX-46.

CX-47 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Changing Face"; agency code number BUF-62AX.

CX-48 Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Urban Renewal"; agency code number BUF-66.

CX-49 Film of a 45 sec. television advertisement for Bufferin entitled "Urban Renewal"; agency code number BUF-67.

CX-49a Storyboard version of the film advertisement designated CX-49.

CX-50 Film of a 60 sec. television advertisement for Bufferin entitled "Urban Renewal"; agency code number BUF-77.

CX-50a Storyboard version of the film advertisement designated CX-50.

CX-51 Film of a 45 sec. television advertisement for Bufferin entitled "Urban Renewal"; agency code number BUF-77A.

CX-51a Storyboard version of the film advertisement designated CX-51.

CX-52 Film of a 30 sec. television advertisement for Bufferin entitled "College Professor"; agency code number BUF-61A.

CX-52a Storyboard version of the film advertisement designated CX-52.

CX-53 Film of a 45 sec. television advertisement for Bufferin entitled "College Professor"; agency code number BUF-76.

CX-53a Storyboard version of the film advertisement designated CX-53.

CX-54 Film of a 30 sec. television advertisement for Bufferin entitled "College Professor"; agency code number BUF-75AR.

CX-54a Storyboard version of the film advertisement designated CX-54.

CX-55 Film of a 60 sec. television advertisement for Bufferin entitled "College Professor"; agency code number BUF-75.

CX-55a Storyboard version of the film advertisement designated CX-55.

CX-56 Film of a 60 sec. television advertisement for Bufferin entitled "College Professor"; agency code number BUF-57.

CX-56a Storyboard version of the film advertisement designated CX-56.

CX-57 Film of a 30 sec. television advertisement for Bufferin entitled "New Housing"; agency code number BUF-101AY.

CX-57a Storyboard version of the film advertisement designated CX-57.

CX-58 Film of a 60 sec. television advertisement for Bufferin entitled "New Housing-Long"; agency code number BUF-101Y.

CX-58a Storyboard version of the film advertisement designated CX-58.

CX-59 Storyboard version of a 45 sec. television advertisement for Bufferin entitled "New Housing"; agency code number BUF-102Y.

CX-60 Film of a 30 sec. television advertisement for Bufferin entitled "Bussing"; agency code number BUF-98AY.

CX-60a Storyboard version of the film advertisement designated CX-60.

CX-61 Film of a 45 sec. television advertisement for Bufferin entitled "Arthritis Applause"; agency code number BUF-58AX.

CX-61a Storyboard version of the film advertisement designated CX-61.

CX-62 Film of a 60 sec. television advertisement for Bufferin entitled "Arthritis Applause"; agency code number BUF-58X.

CX-63 Film of a 60 sec. television advertisement for Bufferin entitled "Kids Chorus"; agency code number BUF-20X.

CX-63a Storyboard version of the film advertisement designated CX-63.

CX-64 Film of a 45 sec. television advertisement for Bufferin entitled "Kids Chorus"; agency code number BUF-27X.

CX-64a Storyboard version of the film advertisement designated CX-64.

CX-65 Film of a 30 sec. television advertisement for Bufferin entitled "Dressmaker-Revised"; agency code number BMBU 0213.

CX-65a Storyboard version of the film advertisement designated CX-65.

CX-66 Film of a 30 sec. television advertisement for Bufferin entitled "Dressmaker"; agency code number BMBU 0063.

CX-66a Storyboard version of the film advertisement designated CX-66.

CX-67 Film of a 60 sec. television advertisement for Bufferin entitled "Dressmaker"; agency code number BUF-113.

CX-67a Storyboard version of the film advertisement designated CX-67.

CX-68 Film of a 30 sec. television advertisement for Bufferin entitled "Glass Man-Rev. II"; agency code number BMBU 0183.

CX-68a Storyboard version of the film advertisement designated CX-68.

CX-69 Film of a 30 sec. television advertisement for Bufferin entitled "Glass Man"; agency code number BUF-113.

CX-69a Storyboard version of the film advertisement designated CX-69.

CX-70 Film of a 30 sec. television advertisement for Bufferin entitled "Monolith/ABC-NBC"; agency code number BMBU 1323.

1-71 Film of a 30 sec. television advertisement for
 Bufferin entitled "Monolith with Digs"; agency code
 number BMBU 1433.

X-71a Storyboard version of the film advertisement desig-
 nated CX-71.

CX-72 Film of a 30 sec. television advertisement for
 Bufferin entitled "Monolith/ABC-NBC"; agency code
 number BMBU 1443.

CX-72a Storyboard versio of the film advertisement desig-
 nated CX-72.

CX-73 Film of a 30 second television advertisement for
 Bufferin entitled "Monolith"; agency code number
 BMBU 1453.

CX-73a Storyboard version of the film advertisement desig-
 nated CX-73.

CX-74 Film of a 30 sec. television advertisement for
 Bufferin entitled "Monolith/Rev. 2/ABC-NBC"; agency
 code number BMBU 1523.

CX-74a Storyboard version of the film advertisement desig-
 nated CX-74.

CX-75 Film of a 30 sec. television advertisement for
 Bufferin entitled "Monolith.Rev. II/CBS; agency code
 number BMBU 1533.

CX-75a Storyboard version of the film advertisement desig-
 nated CX-75.

CX-76 Film of a 30 sec. television advertisement for
 Bufferin entitled "Monolith"; agency code number
 BMBU 3293.

CX-76a Storyboard version of the film advertisement desig-
 nated CX-76.

CX-77 Film of a 30 sec. television advertisement for
 Bufferin entitled "Solarization"; agency code number
 BMBU 0043.

CX-77a Storyboard version of the film advertisement desig-
 nated CX-77.

CX-78 Film of a 30 sec. television advertisement for Bufferin entitled "Health"; agency code number BMBU 1463.

CX-78a Storyboard version of the film advertisement designated CX-78.

CX-79 Film of a 30 sec. television advertisement for Bufferin entitled "New Exercise"; agency code number BMBU 1483.

CX-79a Storyboard version of the film advertisement designated CX-79.

CX-80 Film of a 30 sec. television advertisement for Bufferin entitled "Woman/Roll-Up"; agency code number BMBU 2063.

CX-80a Storyboard version of the film advertisement designated CX-80.

CX-81 Film of a 30 sec. television advertisement for Bufferin entitled "Woman/Roll-Up/Rev."; agency code number BMBU 2173.

CX-81a Storyboard version of the film advertisement designated CX-81.

CX-82 Film of a 30 sec. television advertisement for Bufferin entitled "By the Sea"; agency code number BMBU 1313.

CX-82a Storyboard version of the film advertisement designated CX-82.

CX-83 Film of a 30 sec. television advertisement for Bufferin entitled "Mother/Child"; agency code number BMBU 1343.

CX-83a Storyboard version of the film advertisement designated CX-83.

CX-84 Film of a 30 sec. television advertisement for Bufferin entitled "Candlelight"; agency code number BMBU 3083.

CX-84a Storyboard version of the film advertisement designated CX-84.

CX-85 Film of a 30 sec. television advertisement for Bufferin entitled "Soft Cuts -CBS Version"; agency code number BMBU 4463.

CX-85a Storyboard version of the film advertisement designated CX-85.

CX-86 Film of a 30 sec. television advertisement for Bufferin entitled "Soft Cups/ABC-NBC Alt."; agency code number BMBU 4513.

CX-86a Storyboard version of the film advertisement designated CX-86.

CX-87 Film of a 30 sec. television advertisement for Bufferin entitled "It Started Here"-CBS Version; agency code number BMBU 4553.

CX-87a Storyboard version of the film advertisement designated CX-87.

CX-88 Film of a 30 sec. television advertisement for Bufferin entitled "It Started Here/NBC-ABC Alt."; agency code number BMBU 4503.

CX-88a Storyboard version of the film advertisement designated CX-88.

CX-89 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Airplane"; agency code number BMBU 4863.

CX-90 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Airplane II/ABC-NBC"; agency code number BMBU 4873

CX-91 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Ten Minutes Sooner"; agency code number BMBU 4963.

CX-92 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Bar Graph"; agency code number BMBU 5103.

CX-93 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Bar Graph"; agency code number BMBU 5123.

CX-94 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Bar Graph-Stomach Rev."; agency code number BMBU 5133.

CX-95 Storyboard version of a 30 sec. television advertisement for Bufferin entitled "Quick Cut Graph"; agency code number BMBU 5333.

CX-96

Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Mr. Novak" obtained from a copy test conducted by Young & Rubicam for Bristol-Myers and designated CX 277.

CX-97

Storyboard version of a 60 sec. television advertisement for Bufferin entitled "Modern Drug" obtained from a copy test conducted by Young & Rubicam for Bristol-Myers and designated CX 276.

Print Advertisements

CX-98

A print advertisement for Bufferin captioned "Bufferin; Acts twice as fast as aspirin" which appeared in the November 1950 issue of Life Magazine.

CX-99

A print advertisement for Bufferin captioned "Get fast pain relief" which appeared in the August 4, 1951 issue of Saturday Evening Post.

CX-100

A print advertisement for Bufferin captioned "Catching Cold? Take Bufferin!" which appeared in the March 26, 1955 issue of Saturday Evening Post.

CX-101

A print advertisement for Bufferin captioned "Says Arthur Godfrey, Take it from me..." which appeared in the July 14, 1956 issue of Saturday Evening Post.

CX-102

A print advertisement for Bufferin captioned "If you've been taking aspirin for colds..." which appeared in the January 1957 issue of Life Magazine.

CX-103

A print advertisement for Bufferin captioned "For colds Bufferin acts twice as fast as aspirin" which appeared in the March 9, 1957 issue of Saturday Evening Post.

CX-104

A print advertisement for Bufferin captioned "BUFFERIN; Twice as fast as aspirin for millions! Even faster for many others..." which appeared in the September 1958 issue of Life Magazine.

CX-105

A print advertisement for Bufferin captioned "Why trade your headache for an upset stomach?..." which appeared in the July 11, 1959 issue of Saturday Evening Post.

CX-106

A print advertisement for Bufferin captioned "Important News! Of the three most used pain remedies..." which appeared in the July 12, 1960 issue of Saturday Evening Post.

- CX-107 A print advertisement for Bufferin captioned "In about 10 seconds, you will know a lot about the three leading headache tablets"; agency code number BM-7367.
- CX-108 A print advertisement for Bufferin captioned " Bufferin and plain aspirin were taken for a headache at the same time. But..."; agency code number BM-3388.
- CX-109 A print advertisement for Bufferin captioned "Important Difference"; three versions of " Important Difference" agency code number(s) BM-9853, BM-9854 and BM 5202.
- CX-110 A print advertisement for Bufferin captioned "By the time most of Bufferin is going to your head..."; agency code number(s) BM-1366 and BM-65, two versions.
- CX-111 A print advertisement for Bufferin captioned "Plain aspirin doesn't work as fast as Bufferin"; two versions, agency code number(s) BM-4313 and BM 3936.
- CX-112 A print advertisement for Bufferin captioned "Plain aspirin doesn't work as fast as Bufferin"; two versions, agency code number(s) BM-3854 and BM-4105.
- CX-113 A print advertisement for Bufferin captioned "A series of laboratory studies recently revealed..." which appeared in May 1975 Reader's Digest and June, 1975 Ladies Home Journal.
- CX-114 A print advertisement for Bufferin captioned "Two important facts every Bayer and Anacin user should know.." which appeared in the November 1975 Women's Day Magazine.

EXCEDRIN ADVERTISEMENTS

Test Advertisements

- Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Mr. Ackervly/Formula"; agency code number 73-60.
- 6 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Words/Formula"; agency code number 83-60.
- 17 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Testimonial/Mrs. Barry"; agency code number 33-60.
- 118 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Formula/Basic"; agency code number 30-64.
- 119 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Inner Woman-Rev."; agency code number 10-60.
- 120 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Inner Woman"; agency code number 10-60.
- CX-121 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Formula A"; agency code number 11-60.
- CX-122 Storyboard version of a 45 sec. television advertisement for Excedrin entitled "First Baby"; agency code number 230-45.
- CX-123 Storyboard version of a 45 sec. television advertisement for Excedrin entitled "First Baby"; agency code number 238-45.
- CX-124 Film of a 45 sec. television advertisement for Excedrin entitled "First Baby"; agency code number 273-45.
- CX-124a Storyboard version of the film advertisement designated CX-124.
- CX-125 Film of a 45 sec. television advertisement for Excedrin entitled "First Baby-New Formula"; agency code number 286-45.
- CX-125a Storyboard version of the film advertisement designated CX-125.

CX-126 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Football Season"; agency code number 256-60.

CX-127 Film of a 30 sec. television advertisement for Excedrin entitled "Bills"; agency code number 241-30.

CX-127a Storyboard version of the film advertisement designated CX-127.

CX-128 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Bills"; agency code number 244-30.

CX-129 Storyboard version of a 45 sec. television advertisement for Excedrin entitled "Wallpaper"; agency code number 231-45.

CX-130 Storyboard version of a 45 sec. television advertisement for Excedrin entitled "Wallpaper"; agency code number 251-45.

CX-131 Storyboard version of a 45 sec. television advertisement for Excedrin entitled "Wallpaper"; agency code number 253-45.

CX-132 Film of a 45 sec. television advertisement for Excedrin entitled "Wallpaper"; agency code number 273-45.

CX-132a Storyboard version of the film advertisement designated CX-132.

CX-133 Film of a 45 sec. television advertisement for Excedrin entitled "Wallpaper"; agency code number 274-45.

CX-133a Storyboard version of the film advertisement designated CX-133.

CX-134 Storyboard version of a 45 sec. television advertisement for Excedrin entitled "Wallpaper"; agency code number 239-45.

CX-135 Film of a 45 sec. television advertisement for Excedrin entitled "Headache #28"; agency code number 236-45.

X-135a Storyboard version of the film advertisement designated CX-135.

X-136 Film of a 30 sec. television advertisement for Excedrin entitled "Bumper" (ABC); agency code number 243-30.

CX-136a Storyboard version of the film advertisement designated CX-136.

CX-137 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Locked Bumpers"; agency code number 246-30.

CX-138 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Parking Attendant"; agency code number 283-60.

CX-139 Film of a 45 sec. television advertisement for Excedrin entitled "Parking Attendant"; agency code number 291-45.

CX-139a Storyboard version of the film advertisement designated CX-139.

CX-140 Film of a 45 sec. television advertisement for Excedrin entitled "Parking Attendant"; agency code number 291-45.

CX-141 Film of a 45 sec. television advertisement for Excedrin entitled "Hands"; agency code number 276-45.

CX-141a Storyboard version of the film advertisement designated CX-141.

CX-142 Film of a 45 sec. television advertisement for Excedrin entitled "Tax Audit"; agency code number 239-45.

CX-142a Storyboard version of the film advertisement designated CX-142.

CX-143 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Tax Audit"; agency code number 203-60.

CX-144 Film of a 45 sec. television advertisement for Excedrin entitled "Early Riser"; agency code number 294-45.

CX-144a Storyboard version of the film advertisement designated CX-144.

CX-145 Film of a 45 sec. television advertisement for Excedrin entitled "Miss Teresa Parkening"; agency code number 297-45.

CX-145a Storyboard version of the film advertisement designated CX-145.

CX-146 Film of a 45 sec. television advertisement for Excedrin entitled "Ashen/Pectic/Parkening"; agency code number 306-45.

CX-146a Storyboard version of the film advertisement designated CX-146.

CX-147 Film of a 30 sec. television advertisement for Excedrin entitled "Ackerly/Allender/Rush"; agency code number 308-30.

CX-147a Storyboard version of the film advertisement designated CX-147.

CX-148 Film of a 45 sec. television advertisement for Excedrin entitled "Garner/Voodre/Arico"; agency code number 302-45.

CX-148a Storyboard version of the film advertisement designated CX-148.

CX-149 Film of a 45 sec. television advertisement for Excedrin entitled "Marquez/Arico/Ashen"; agency code number 300-45.

CX-149a Storyboard version of the film advertisement designated CX-149.

CX-150 Film of a 60 sec. television advertisement for Excedrin entitled "Marquez/Arico/Ashen"; agency code number 299-60.

CX-150a Storyboard version of the film advertisement designated CX-150.

CX-151 Film of a 60 sec. television advertisement for Excedrin entitled "Total Pain"; agency code number 304-60.

CX-151a Storyboard version of the film advertisement designated CX-151.

CX-152 Film of a 30 sec. television advertisement for Excedrin entitled "Total Pain Testimonial"; agency code number 311-30.

CX-152a Storyboard version of the film advertisement designated CX-152.

CX-153 Film of a 30 sec. television advertisement for Excedrin entitled "Atlantic City-Balcony"; agency code number 328-30.

CX-153a Storyboard version of the film advertisement designated CX-153.

CX-154 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Atlantic City-Balcony"; agency code number 329-30.

CX-155 Film of a 45 sec. television advertisement for Excedrin entitled "Atlantic City-Indoor" (ABC); agency code number 337-45.

CX-155a Storyboard version of the film advertisement designated CX-155.

CX-156 Film of a 45 sec. television advertisement for Excedrin entitled "Atlantic City-Indoor" (CBS); agency code number 338-45.

CX-156a Storyboard version of the film advertisement designated CX-156.

CX-157 Film of a 30 sec. television advertisement for Excedrin entitled "Atlantic City-Indoor" (ABC); agency code number 343-30.

CX-157a Storyboard version of the film advertisement designated CX-157.

CX-158 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Atlantic City-Balcony (ABC); agency code number 324-60.

CX-159 Film of a 60 sec. television advertisement for Excedrin entitled "Atlantic City-Balcony (CBS); agency code number 325-60.

CX-159a Storyboard version of the film advertisement designated CX-159.

CX-160 Storyboard version of a 45 sec. television advertisement entitled "Atlantic City" (ABC); agency code number 326-45.

CX-161 Storyboard version of a 45 sec. television advertisement for Excedrin entitled "Atlantic City" (CBS & NBC); agency code number 327-45.

CX-162 Film of a 30 sec. television advertisement for Excedrin entitled "Snowdrift" (AEC); agency code number 323-30.

CX-162a Storyboard version of the film advertisement designated CX-162.

CX-163 Film of a 30 sec. television advertisement for Excedrin entitled "Snowdrift" (CBS); agency code number 316-30.

CX-163a Storyboard version of the film advertisement designated CX-163.

CX-164 Film of a 30 sec. television advertisement for Excedrin entitled "Straight Talk" (ABC); agency code number 352-30.

CX-164a Storyboard version of the film advertisement designated CX-164.

CX-165 Film of a 30 sec. television advertisement for Excedrin entitled "Straight Talk" (CBS); agency code number 353-30.

CX-165a Storyboard version of the film advertisement designated CX-165.

CX-166 Film of a 30 sec. television advertisement for Excedrin entitled "Soundstage" (CBS); agency code number 354-30

CX-166a Storyboard version of the film advertisement designated CX-166.

CX-167 Film of a 30 sec. television advertisement for Excedrin entitled "Soundstage" (CBS); agency code number 355-30.

CX-167a Storyboard version of the film advertisement designated CX-167.

CX-168 Film of a 30 sec. television advertisement for Excedrin entitled "Anatomical Man"; agency code number BMEX-1223.

CX-168a Storyboard version of the film advertisement designated CX-168.

CX-169 Film of a 30 sec. television advertisement for Excedrin entitled "Animated Man"; agency code number 322-30.

CX-169a Storyboard version of the film advertisement designated CX-169.

CX-170 Film of a 30 sec. television advertisement for Excedrin entitled "Reprise"; agency code number BMEX-0023.

CX-170a Storyboard version of the film advertisement designated CX-170.

CX-171 Film of a 30 sec. television advertisement for Excedrin entitled "Logic"; agency code number BMEX-0043.

CX-171a Storyboard version of the film advertisement designated CX-171.

CX-172 Film of a 30 sec. television advertisement for Excedrin entitled "Tear"; agency code number BMEX 0053.

CX-172a Storyboard version of the film advertisement designated CX-172.

CX-173 Film of a 30 sec. television advertisement for Excedrin entitled "Evidence"; agency code number BMEX-0073.

CX-173a Storyboard version of the film advertisement designated CX-173.

CX-174 Film of a 30 sec. television advertisement for Excedrin entitled "Illustrated Man"; agency code number BMEX-1193.

CX-174a Storyboard version of the film advertisement designated CX-174.

CX-175 Film of a 30 sec. television advertisement for Excedrin entitled "Question"; agency code number BMEX-2283.

CX-175a Storyboard version of the film advertisement designated CX-175.

CX-176 Film of a 45 sec. television advertisement for Excedrin entitled "Progress"; agency code number BMEX-1114.

CX-176a Storyboard version of the film advertisement designated CX-176.

CX-177 Film of a 30 sec. television advertisement for Excedrin entitled "Two Sides"; agency code number BMEX-2303.

CX-177a Storyboard version of the film advertisement designated CX-177.

CX-178 Film of a 30 sec. television advertisement for Excedrin entitled "Best of Winter"; agency code number BMEX-2593.

CX-178a Storyboard version of the film advertisement designated CX-178.

CX-179 Film of a 30 sec. television advertisement for Excedrin entitled "Pairs"; agency code number BMEX-3793

CX-179a Storyboard version of the film advertisement designated CX-179.

CX-180 Film of a 30 sec. television advertisement for Excedrin entitled "Pairs"; agency code number BMEX-3753

CX-180a Storyboard version of the film advertisement designated CX-180.

CX-181 Film of a 30 sec. television advertisement for Excedrin entitled "Mine-Yours/W. Spivey"; agency code number BMEX-4903.

CX-182 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Standards"; agency code number BMEX-1123.

CX-183 Film of a 45 sec. television advertisement for Excedrin entitled "Eggs"; agency code number 235-45.

CX-183a Storyboard version of the film advertisement designated CX-183.

CX-184 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Limbo Bottle #2"; agency code number BMEX-1183.

CX-185 Film of a 30 sec. television advertisement for Excedrin entitled "Documents"; agency code number BMEX-1163.

CX-185a Storyboard version of the film advertisement designated CX-185.

CX-186 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Namath-Pills"; agency code number 334-30.

CX-187 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Medical Evidence/Janice Kent Alt"; agency code number BMEX-5503.

CX-188 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Medical Evidence/Janice Kent"; agency code number BMEX-5193.

CX-189 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Medical Evidence/Wayne Bryant"; agency code number BMEX-5223.

CX-190 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Medical Evidence/Vernee Watson"; agency code number BMEX-5233

CX-191 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Medical Evidence/Vernee Watson"; agency code number BMEX-5203.

CX-192 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Medical Evidence/Joel Higgins"; agency code number BMEX-5153.

CX-193 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Mine-Yours/Eileen O'Neill"; agency code number BMEX-4063.

CX-194 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Mine-Yours/John Dewey Carter"; agency code number BMEX-4953. /

CX-195 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Medical Evidence/David Janssen"; agency code number BMEX-5353.

CX-196 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Mine-Yours/John Dewey Carter"; agency code number BMEX-5343.

CX-197 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Improvements"; agency code number BMEX-5343.

CX-198 Storyboard version of a 30 sec. television advertisement for Excedrin entitled "Improvements"; agency code number BMEX-5403.

CX-199 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Mrs. Mirkin" obtained from a copy test conducted by Young & Rubicam for Bristol-Myers and designated CX 283.

CX-200 Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Busy Woman" obtained from a copy test conducted by ASI for Bristol-Myers and designated CX 253.

CX-201

Storyboard version of a 60 sec. television advertisement for Excedrin entitled "Four Faces" obtained from a copy test conducted by ASI for Bristol-Myers and designated CX 253.

Print Advertisements

CX-202

A print advertisement for Excedrin captioned "Works a lot better than common aspirin" agency code number 31744.

CX-203

A print advertisement for Excedrin captioned "What's better than aspirin?"; agency code number 31144.

CX-204

Nine versions of a print advertisement for Excedrin captioned "Aspirin isn't best anymore"; agency code numbers 31751; 32634; 32716; 31743; 32717; 32718; 32981; 31751; and 31751A.

CX-205

Nine versions of a print advertisement for Excedrin captioned "This pain reliever is significantly more effective than common aspirin..." ; agency code numbers PB-10786-A; PB-10786-B; PB-10786-C; PB-10786-D; PB-10786-E; PB-10786-F; PB-10786-H and PB-10786-I.

CX-206

Seven versions of a print advertisement for Excedrin captioned "Two important medical studies..." agency code numbers PB-12207-A; PB-12207; PB-12207-B; PB-14813-A; PB-14813-B; PB-14813; and PB-16264.

CX-207

Four versions of a print advertisement for Excedrin captioned "It's hard to ignore one medical study"; agency code numbers PB-14813-A; PB-14813-B; PB-14813; and PB-16264.

CX-208

A print advertisement for Excedrin captioned "Aspirin is not the most effective pain reliever you can buy." agency code number PB-29863.

CX-209

A print advertisement for Excedrin captioned "Shape up with Excedrin"; agency code number 26885.

CX-210

A print advertisement for Excedrin captioned "It's not just my opinion that Excedrin has worked better than regular aspirin..." which appeared in the May and June, 1975 issue of Ladies Home Journal; May & June, 1975 issue of Cosmopolitan; June 1975 issue of Ms.; and June, 1975 issue of Glamour.

CX-311

A print advertisement for Excedrin captioned "You don't have to take my word that Excedrin has worked better than regular aspirin... (David Janssen)" which appeared in the September 17, 1975 issue of New York Times; September 18, 1975 issue of Washington Post; October, 1975 issue of Ms.; and November, 1975 issue of Family Circle.

CX-707

A print advertisement for Excedrin captioned "Your period is not a simple headache"; agency code number 27045.

CX-708

A print advertisement for Excedrin captioned "It was this simple" Four aspirin...or two Excedrin"; agency code number 04143.

EXCEDRIN P. M. ADVERTISEMENTS

Broadcast Advertisements

- CX-212 Film of a 30 sec. television advertisement for Excedrin PM entitled "Sleeping Man"; agency code number PM-1-30.
- CX-213 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Sleeping Man"; agency code number PM-9-30.
- CX-213a Storyboard version of film advertisement designated CX-213.
- CX-214 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Sleeping Woman"; agency code number PM-2-30.
- CX-214a Storyboard version of the film advertisement designated CX-214.
- CX-215 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Sleeping Woman"; agency code number PM-8-30.
- CX-215a Storyboard version of the film advertisement designated CX-215.
- CX-216 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Bedtime Headache"; agency code number PM-21-30.
- CX-216a Storyboard version of the film advertisement designated CX-216.
- CX-217 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Bedtime Headache"; agency code number PM-7-30.
- CX-217a Storyboard version of the film advertisement designated CX-217.
- CX-218 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Bedtime Headache"; agency code number PM-3-30.
- CX-218a Storyboard version of the film advertisement designated CX-218.

CX-219 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Kids to Bed"; agency code number PM-17-30.

CX-219a Storyboard version of the film advertisement designated CX-219.

CX-220 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Night Sounds"; agency code number PM-28-30.

CX-220a Storyboard version of the film advertisement designated CX-220.

CX-221 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Night Sounds"; agency code number PM-33-20.

CX-221a Storyboard version of the film advertisement designated CX-221.

CX-222 Storyboard version of a 30 sec. television advertisement for Excedrin P.M. entitled "Dice Cups"; agency code number PM-20-30.

CX-223 Film of a 60 sec. television advertisement for Excedrin P.M. entitled "Merv Griffin"; agency code number MG-1-60.

CX-223a Storyboard version of the film advertisement designated CX-223.

CX-224 Storyboard version of a 60 sec. television advertisement for Excedrin P.M. entitled "Merv Griffin"; agency code number MG-2-60.

CX-225 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Merv Griffin"; agency code number MG-3-30.

CX-225a Storyboard version of the film advertisement designated CX-225.

CX-226 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Merv Griffin"; agency code number MG-4-30.

CX-226a Storyboard version of the film advertisement designated CX-226.

CX-227 Film of a 30 sec. television advertisement for Excedrin entitled "Merv Griffin"; agency code number MG-5-30.

CX-228 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Day Into Night"; agency code number PM-32-30.

CX-228a Storyboard version of the film advertisement designated CX-228.

CX-229 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Day Into Night"; agency code number PM-27-30.

CX-229a Storyboard version of the film advertisement designated CX-229.

CX-230 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Sailboat-Rev."; agency code number BMEP-3453

CX-230a Storyboard version of the film advertisement designated CX-230.

CX-231 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Sailing"; agency code number BMEP-2373.

CX-231a Storyboard version of the film advertisement designated CX-231.

CX-232 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Sailboat Revised"; agency code number BMEP-2393.

CX-232a Storyboard version of the film advertisement designated CX-232.

CX-233 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Difference"; agency code number BMEP-1083.

CX-233a Storyboard version of the film advertisement designated CX-233.

CX-234 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Bedtime Headache"; agency code number BMEP-2263.

CX-234a Storyboard version of the film advertisement designated CX-234.

CX-235 Film of a 30 sec. television advertisement for Excedrin P.M. entitled "Presenter"; agency code number BMEP-2283.

CX-235a Storyboard version of the film advertisement designated CX-235.

CX-236 Storyboard version of a 30 sec. television advertisement for Excedrin P.M. entitled "Patricia Neal"; agency code number BMEP-2293.

CX-237 Storyboard version of a 30 sec. television advertisement for Excedrin P.M. entitled "Mother & Daughter"; agency code number BMEP-2253.

CX-238 Storyboard version of a 30 sec. television advertisement for Excedrin P.M. entitled "Camping Trip"; agency code number BMEP-5563.

CX-239 Storyboard version of a 30 sec. television advertisement for Excedrin P.M. entitled "Farm"; agency code number BMEP-4483.

Print Advertisements

CX-240 A print advertisement for Excedrin P.M. captioned "Pain is different at night", five versions, agency code number(s) 25877; 27845A; 26340; 26979; and 29513.

CX-241 A print advertisement for Excedrin P.M. captioned "Logical idea"; agency code number 27094.

CX-242 A print advertisement for Excedrin P.M. captioned "Tonight, pain relief and help to sleep", 5 versions, agency code number(s) 01903; 33923; 31626; 29348; and PB-27224.

CX-243 A print advertisement for Excedrin P.M. captioned "Nighttime pain and its tension?", two versions, agency code number(s) PB-12037-B and PB-13926-B.

CX-244 A print advertisement for Excedrin P.M. captioned "Free. Relief for headache and its tension."; agency code number PB-13296-C.

CX-709 A print advertisement for Excedrin P.M. captioned "Free: Pain relief and help to sleep"; agency code number 29696.

- CX-710 A print advertisement for Excedrin P.M. captioned "A little arthritis can make a long, long night." Agency code number 29731.
- CX-711 A print advertisement for Excedrin P.M. captioned "Relieves pain. And helps you sleep"; agency code number 27845.
- CX-712 A print advertisement for Excedrin P.M. captioned "The makers of Excedrin announce:"; agency code number 23713.
- CX-713 A print advertisement for Excedrin P.M. captioned "Logical idea"; agency code number 27094.

COPY TESTS

A.S.I. Audience Reaction Tests:

- CX-245 ASI Audience Reaction Tests; Bufferin Commercial, "Dinner Party" (45 sec., finished, b&w); Excedrin Commercial, "Laundry Room" (45 sec., finished, b&w); June 6, 9, 12 and 15, 1968.
- CX-246 Recall Verbatims for Bufferin Commercial, "Dinner Party" (45 sec., finished, b&w); Excedrin Commercial, "Laundry Room" (45 sec., finished, b&w); June 6, 9, 12 and 15, 1968
- CX-247 Bufferin Commercials, "Two Clocks", High-Speed Formula", "Half Time-Safety" (30 sec., finished, b&w), ASI In-Home Test, December, 1968.
- CX-248 Bufferin Commercial, "Health Revised" (30 sec., finished, color), ASI Audience Reaction Test, March 31, 1971.
- CX-249 Bufferin Commercial, "New Exercise", (30 sec., finished, color) ASI Audience Reaction Test, September 9, 1971.
- CX-250 Bufferin Commercial, "By the Sea" (30 sec., finished, color) ASI Audience Reaction Test, December 22, 1971.
- CX-251 Bufferin Commercial, "Monolith" (30 sec., finished, color), ASI Audience Reaction Test; June 25, 1971.
- CX-252 Bufferin Commercials, "It Started Here" and "Soft Cups" (30 sec. each, finished) ASI Audience Reaction Test, January 19, 21, 1974.
- CX-253 Excedrin Commercials, "Busy Woman/Candid", "Mrs Cipriano", "Four Faces", "Busy Woman", ASI Audience Reaction Tests, April 28, 30, and May 2, 3, 1966.
- CX-254 Excedrin Commercial, "Atlantic City" (60 sec., finished, b&w), ASI Audience Reaction Test, November 8, 1969.
- CX-255 Excedrin Commercial, "Atlantic City- 30" (30 sec., finished, b&w), ASI Audience Reaction Test, November 23, 1969.

- CX-256 Excedrin Commercial, "Snowflakes" (30 sec., finished, b&w); ASI Audience Reaction Test, November 26, 1969.
- CX-257 Excedrin Commercials, "David Janssen Logic" (30 sec., finished, b&w), ASI Audience Reaction Test conducted on August 20 and 24, 1970.
- CX-258 Excedrin Commercial, "Standards" (30 sec., finished, color), ASI Audience Reaction Test, April 27, 1971.
- CX-259 Presentation of Two Excedrin P.M. Commercials ("Bedtime Headache", "Sleeping Women") (30 sec., finished, b&w, ASI), March 25, 26, 1969.
- CX-260 Presentation to Young & Rubicam of Excedrin P.M. Commercial, ("Dice-Cups") (45 sec., finished, w), ASI Audience Reaction Tests) June 1969.
- CX-261 Presentation to Young & Rubicam of two Excedrin P.M. Commercials ("Pajama Party", "Troubles -- Home/Male") 30 sec., finished, b&w, ASI Audience Reaction Tests) Sept. 25, 28, 1969.
- CX-262 Presentation to Y & R of two Excedrin P.M. Commercials ("Day Into Night", "Night Sounds"), 30 sec., finished, b&w, ASI Audience Reaction Tests), May 21, 22, 1970.
- CX-263 Presentation to Y & R of an Excedrin P.M. Commercial, ("Difference") 30 sec., finished, color, ASI Audience Reaction Test, April 26, 1971.
- CX-264 Presentation to Y & R of Excedrin P.M. Commercial ("Difference/St Louis") 30 sec., finished, color, ASI Audience Reaction Test, May 17, 1971.
- CX-265 Presentation to Bristol-Myers and Young & Rubicam of two Excedrin commercials ("Two Studies" and "Coupon"), Audience Studies/Comlab, Inc., June 9, 1972.

B. Ted Bates Copy Reports:

CX-266 Copy Laboratory Report: Bufferin Commercial, "Walk In The City", 60 sec., b&w, Feb. 1968.

CX-267 Copy Laboratory Report: Bufferin Commercial, "Half Time/Man" (BUF-1X) ABC Only, 45 sec., b&w, March, 1968.

CX-268 Copy Laboratory Report: Bufferin Commercial, "Half Time/Man" (BUF-1AX) ABC Only, 30 sec., b&w, March, 1968.

CX-269 Copy Laboratory Report: Bufferin Commercial, "Moving Day" (BUF-13AX), 30 sec., color, June 1968.

CX-270 Copy Laboratory Report: Bufferin Commercials, "Dinner Party" (BUF-9AX) 30 sec., color; "Dinner Party" (BUF-9X) 45 sec., color, June 1968.

CX-271 Report of Copy Test on Bufferin Commercial, "Half Time/Woman" (30 sec., b&w, BUF-2X) May 14, 1968.

CX-272 Copy Laboratory Report: Bufferin Commercials, "Half Time/Safety" (BUF-37AX) 30 sec., color; "High Speed Formula" (BUF-28AX) 30 sec., color; "Beauty Parlor/Two Clocks" (BUF-38AX) 30 sec., color, December 1968.

CX-273 Report of Copy Test on Bufferin Commercial, "Woman/Stomach" (BUF-52AX) 30 sec., color, April-May, 1969.

CX-274 Ted Bates Quick Copy Lab., Bufferin Commercial, "New Housing" (BUF-102Y), Dec. 16, 1969.

CX-275 Report of Copy Test on Bufferin Commercial, "Sensitive People/College Professor", (BUF-61R:45). (No Date).

C. Young & Rubicam Copy Research:

- CX-276 Telephone Survey of Bufferin. "Modern Drug" Commercial, October 1961, prepared by Young & Rubicam (RPO 1392).
- CX-277 Bufferin On-Air Par Test: Bufferin Commercial "Mr. Novak"; April 1964, prepared by Young & Rubicam (RPO 4229).
- CX-278 Mobile Theater Survey of "Inner Woman" and "Formula" Excedrin T.V. Commercials, June 1962, prepared by Young & Rubicam, (RPO 2236).
- CX-279 Mobile Trailer Test of Two Excedrin Commercials "Testimonial" and "Inner Woman", November 1962, prepared by Young & Rubicam (RPO 2458).
- CX-280 Excedrin On-Air Memorability Tests of "Testimonial" and "Basic Formula", January 1963, prepared by Young & Rubicam (RPO 2683).
- CX-281 On-Air Simultaneous Exposure Test of Four Excedrin Commercials ("Formula", 60 sec., and 30 sec.; "Testimonial"; and "Combination"), April 1963, prepared by Young & Rubicam (RPO 3004).
- CX-282 A Comparison of single and multiple Exposures to alternative Excedrin Commercials ("Testimonial", "Words", "Mark Dana"), December 1964, prepared by Young & Rubicam (RPO 4565-I-II).
- CX-283 Anteroom Trailer Test of Two Excedrin Commercials, "Mrs. Mirkin" vs. "More than Aspirin", November, 1965, prepared by Young & Rubicam (RPO 5373).
- CX-284 Analgesic TV Commercial Test: I Excedrin-Big Bottle Limbo. ("What's For Dinner?"). July 1967, prepared by Young & Rubicam (RPO 7132).
- CX-285 Analgesic TV Commercial Test: Excedrin - "Bills", April 1968, prepared by Young & Rubicam (RPO 7485).

- CX-286 Analgesic TV Commercial Test: Excedrin - "Eggs" (45:), October 1966, prepared by Young & Rubicam (RPO 8290).
- CX-287 Analgesic TV Commercial Test: "Excedrin Headache #28" (45:), November 1968, prepared by Young & Rubicam (RPO 8347).
- CX-288 Analgesic TV Commercial Test: Excedrin "Locker Bumpers" (30:), "First Baby" (45:) October 1968, prepared by Young & Rubicam (RPO 8348).
- CX-289 Analgesic TV Commercial Test: Excedrin "Hands" (45:), February 1969, Rewrite of Ostberg Study by Young & Rubicam (RPO 9018)
- CX-290 Analgesic TV Commercial Test: Excedrin "First Baby with Formula" (45:), April, 1969, prepared by Young & Rubicam (RPO 9112).
- CX-291 Ante-Roon Trailer Test of Two Excedrin Commercials: "Reprise" and "X-Ray", March 1971, prepared by Young & Rubicam (RPO 9922)
- CX-292 Copy Test of a Present and a New Excedrin (print) Advertisement; (RPO 2194), April 1962, prepared by Young & Rubicam.
- CX-293 Copy Test of Two Excedrin Ads in TV Guide; (RPO 3071); March 1963.
- CX-294 A Split Run Copy Test of Three Excedrin (print) Ads; (RPO 3329), July, 1963.

D. Grey Marketing and Research Department:

- CX-295 Two Studies of Bufferin "Cotten-Headache" Commercials, Jan. 1965, prepared by Grey Marketing and Research Department.
- CX-296 A Copy Research Study: Effectiveness of Two Bufferin Commercials -- "Big Body" and "Morning Headache", June 1965, prepared by Grey Marketing and Research Department.
- CX-297 A Copy of Research Study: Effectiveness of The Bufferin "Zoo" and "Zoo-A" Commercials, July 1966, prepared by Grey Marketing and Research Department.

.. Schwerin Research Corporation Copy Research:

CX-298 Preliminary Report; Bufferin "Niven-Study",
"Niven-Conference", March 2, 1966, prepared
by Schwerin Research.

F. Suburban Associates Copy Research:

CX-299 "Bates Quick Copy Lab conducted by
Suburban Associates of Bufferin Commercial
"Sensitive People"; April 29, 1969, Memo
from Anne Weitz of Ted Bates to Kutler of
Bristol-Myers Co. attached.

CX-300 Memo from Dick Mullan to Anne Weitz of
Ted Bates Co., May 6, 1970, regarding
"Quick Copy Lab, Glass Man, BUF-120, :30,"
a Suburban Associates Report attached.

CX-301 "Bufferin: Report on Arthritis Copy Test:
"Piano Teacher" :60 (BUF-89AX), "Piano
Teacher" :30 (BMBU-0093), October 1970,
prepared by Suburban Associates.

G. H.D. Ostberg Copy Research:

CX-302 Evaluation of Analgesic Commercials (Part 3)
("Big Bottle"; Bayer- "Edge of Night"),
August 1967, prepared by H.D. Ostberg.

CX-303 Evaluation of Excedrin "Hands" (45 sec.),
Commercial, February 1969, prepared by
H.D. Ostberg.

CX-304 Evaluation of Excedrin: "First Baby-
New Formula" (45 sec.) Commercial, April,
1969, prepared by H.D. Ostberg.

- CX-305 MTBI Study, prepared by H.J. Mead Research with tabulations by Ted Bates & Company, Inc.
- CX-306 National Analgesic Market Study, prepared by National Research Foundation for Business Statistics with analyses and retabulations by Young and Rubicam. 1966
- CX-307 Bufferin Major Market Study, prepared by Fourienzos Organization with analyses by Ted Bates & Company. 1971
- CX-308 National Analgesic Market Study, prepared by Young & Rubicam. 1973
- CX-309 Proprietary Drug Study, prepared by H.D. Ostberg Associates. 1968
- CX-310 The 1969 Excedrin Study, prepared by Young and Rubicam. 1969
- CX-311 The Excedrin East-West Study, prepared by Young and Rubicam. 1971
- CX-312 Quarterly Excedrin Franchise Status Surveys, prepared by Young & Rubicam; Reports of March 4, 1964; May 26, 1964; August 5, 1964; September 4, 1974; October 12, 1964; November 30, 1964; March 29, 1965; June 13, 1965.
- CX-313 Demographic Analysis of Analgesic Buyers, prepared by Market Science Associates. May 1966
- CX-314 Pain Reliever Telephone Study, prepared by Edward Blank Research, Inc. July 1972
- CX-315 Pain Reliever Sampling Survey-Wave I, prepared by Edward Blank Research, Inc. June 1973
- CX-316 National Brand Flow Study Among Major Analgesic Brands, prepared by Young & Rubicam, Inc. May 1963
- CX-317 Bufferin Brand Flow Study, prepared by National Family Opinion. June 10, 1964.
- CX-318 Bufferin Brand Franchise Survey, prepared by Young & Rubicam. November 1961

CX-319 Bufferin Brand Franchise Survey, Summary Presentation, prepared by Bristol-Myers Co. March 1962

CX-320 National Excedrin Usage and Image Study, prepared by Young & Rubicam. January 1964

CX-321 Presentation of Excedrin's First National User Study, prepared by Young and Rubicam. December 1962

CX-322 Report on Continuous Investigation into the Analgesic Market via Intelligence System, prepared by Young and Rubicam. August 1964

CX-323 An Exploratory Study of the Heavy User of Analgesics, prepared by Oxtoby-Smith, Inc. May 1966

CX-324 Pain Reliever Survey-Wave I, prepared by Trendex, Inc. June 1966

CX-325 Bufferin: An Advertising Penetration Study, prepared by Grey Marketing & Research Department. May 1968

CX-326 Advertising Penetration Study, prepared by Ted Bates & Company. April 1971

CX-327 Delineation of Major Analgesic Attributes, prepared by Young & Rubicam. April 1964

CX-328 Consumers' Evaluation of Analgesic Attributes, prepared by Young & Rubicam. September 1964

CX-329 A Report on Consumers' Imagery of Analgesics, prepared by Daniel Yankelovich, Inc. March 1968

CX-330 Analgesic Consumer Analysis for Excedrin Marketing, prepared by Young & Rubicam. January 1967

CX-331 A Study of Headache Sufferers, prepared by Howard J. Mead Marketing Research. October 1968

CX-332 A Study of 501 Arthritics, prepared by Ted Bates & Company, Inc. October 1968

CX-333 Consumer Use of Headache Remedies and Knowledge of Their Ingredients, prepared by The Gallup Organization. June 10, 1964

- CX-334 A Study of Awareness of Aspirin as an Ingredient In Three Major Brands of Compound Pain Relievers prepared by Young & Rubicam, Inc. March 1964
- CX-335 Loyalty to Brands of Pain Relievers, prepared by The Gallup Organization, Inc. April 29, 1965
- CX-336 Tabulations of Excedrin October 1968 Poll, prepared by Young & Rubicam. April 1969
- CX-337 Combined Summary of Two Excedrin P.M. Studies, prepared by Young & Rubicam. March 1972
- CX-338 Telephone Study Among Excedrin P.M. Triers, prepared by Young & Rubicam. March 1972
- CX-339 Excedrin P.M. Mail Panel Survey, prepared by Young & Rubicam. March 1972
- CX-340 Preliminary Findings From Two Excedrin P.M. Studies, prepared by Young & Rubicam. January 1972
- CX-341 Excedrin P.M. National Penetration Study of Awareness, Comprehension And Usage - Volume 1, prepared by Young & Rubicam. October 1970
- CX-342 Excedrin P.M. Attitude, Awareness and Purchase Study, prepared by deKadt Marketing and Research Inc. August 1969
- CX-343 A Study In-Depth of Heavy Users of Analgesics for Headache Relief , prepared for Whitehall Laboratory by Oxtoby-Smith, Inc. August 1967
- CX-344 A Follow-Up Study of Attitudes Toward Headaches and Analgesics Among Heavy Users of Leading Brands, prepared for Whitehall Laboratories by Oxtoby-Smith, Inc. October 1970
- CX-345 Headache Remedy/Pain Reliever Product Usage and Advertising Penetration, A Research Study , prepared for Whitehall Laboratories, American Home Products Corporation, by Sobel-Chaikin Research Associates. April 1973
- CX-346 Assets and Liabilities Study of Adult Analgesic conducted for Glenbrook Laboratories by Research Department, Dancer-Fitzgerald-Sample, Inc. December 1, 1967
- CX-347 A Study of Vanquish's Market Opportunities, Advertising Research Report by Research Services, Benton & Bowles, Inc. November 1970

- CX-348 Health Care Study. Lieberman Research, Inc. 1970. (Tabulations of Data which are basis for report designated CX-347.
- CX-349 A Study of Consumers' Beliefs About the Efficacy and Comparative Efficacy of Certain Non-Prescription Analgesic Products. Clark Leavitt/The Gallup Organization, Inc. 1975-1976.
- CX-350 Reserved for documents related to CX-349.
- CX-351 Reserved for documents related to CX-349.
- CX-352 Reserved for documents related to CX-349.
- CX-353 Sanka Brand Franchise Tracking Study", prepared for Maxwell House Division, General Foods Division, General Foods Corporation by Marketing/Research Department, Young & Rubicam, Inc. August 1970
- CX-354 "Sanka Brand Franchise Tracking Study", prepared for Maxwell House Division, General Foods Division, General Foods Corporation by Research 17, An Independent Service of Young & Rubicam International, Inc. July 1972
- CX-355 "Wave II of a Tracking Study of Coffee Concern" prepared by S.E. Kravitz, Maxwell House Division General Foods Division, General Foods Corporation. April 1973
- CX-356 Technical Supplement: A Comparison of Single and Multiple Exposures to Alternative Excedrin Commercials (RPO 456F-I-II), February, 1965. Prepared by Young & Rubicam.
- CX-357 A Qualitative Study of Consumer Response to the Use of Medical Research in Excedrin Advertising. Prepared for Bristol-Myers Products by Oxtoby-Smith, Inc., August, 1972.

B.. A.C. Nielsen Reports

CX-358 A.C. Nielsen Company Report to Bristol-Myers
Products, a division of Bristol-Myers Company,
on Headache Remedies through January 1, 1968.

CX-359 A.C. Nielsen Company Report to Bristol-Myers
Products, a division of Bristol-Myers Company,
on Headache Remedies through July 1, 1968.

CX-360 A.C. Nielsen Company Report to Bristol-Myers
Products, a division of Bristol-Myers Company,
on Headache Remedies through November 1, 1970.

CX-361 A.C. Nielsen Company Report to Bristol-Myers
Products, a division of Bristol-Myers Company,
on Headache Remedies through January 1, 1971.

CX-362 A.C. Nielsen Company Report to Bristol-Myers
Products, a division of Bristol-Myers Company,
on Headache Remedies through January 1, 1974.

CX-363 A.C. Nielsen Company Report to Bristol-Myers
Products, a division of Bristol-Myers Company,
on Headache Remedies through July 1, 1974.

C. Miscellaneous Marketing Documents

- CX-364 The Non-Narcotic Analgesic Section of
The National Prescription Audit
Therapeutic Category Report, a Ten-Year
Study, 1959-1968. Prepared by R. A.
Gosselin and Company, Inc.
- CX-365 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated June 1969.
Prepared by R. A. Gosselin and Company, Inc.
- CX-366 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated December 1969.
Prepared by R. A. Gosselin and Company, Inc.
- CX-367 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated January 1970.
Prepared by R. A. Gosselin and Company, Inc.
- CX-368 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated June 1970.
Prepared by R. A. Gosselin and Company, Inc.
- CX-369 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated July 1970.
Prepared by R. A. Gosselin and Company, Inc.
- CX-370 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated August 1970.
Prepared by R. A. Gosselin and Company, Inc.
- CX-371 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated September 1970.
Prepared by R. A. Gosselin and Company, Inc.
- CX-372 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report dated October 1970.
Prepared by R. A. Gosselin and Company, Inc.

CX-373 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated November
1970. Prepared by R. A. Gosselin and
Company, Inc.

CX-374 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated December
1970. Prepared by R. A. Gosselin and
Company, Inc.

CX-375 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated January
1971. Prepared by R. A. Gosselin and
Company, Inc.

CX-376 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated February
1971. Prepared by R. A. Gosselin and
Company, Inc.

CX-377 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated March
1971. Prepared by R. A. Gosselin and
Company, Inc.

CX-378 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated April
1971. Prepared by R. A. Gosselin and
Company, Inc.

CX-379 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated May 1971.
Prepared by R. A. Gosselin and Company,
Inc.

CX-380 The Non-Narcotic Analgesic Section of
The National Prescription Audit Thera-
peutic Category Report, dated June 1971.
Prepared by R. A. Gosselin and Company,
Inc.

CX-381	The Quarterly Annual National Disease and Therapeutic Index Report, dated October 1967-September 1968.
CX-382	The Quarterly Annual National Disease and Therapeutic Index Report, dated January 1968-December 1968.
CX-383	The Quarterly Annual National Disease and Therapeutic Index Report, dated April 1968-March 1969.
CX-384	The Quarterly Annual National Disease and Therapeutic Index Report, dated July 1968-June 1969.
CX-385	The Quarterly Annual National Disease and Therapeutic Index Report, dated October 1968-September 1969.
CX-386	The Quarterly Annual National Disease and Therapeutic Index Report, dated January 1969-December 1969.
CX-387	The Quarterly Annual National Disease and Therapeutic Index Report, dated July 1969-June 1970.
CX-388	The Quarterly Annual National Disease and Therapeutic Index Report, dated January 1970-December 1970.
CX-389	The Quarterly Annual National Disease and Therapeutic Index Report, dated April 1970-March 1971.
CX-390	The Quarterly Annual National Disease and Therapeutic Index Report, dated July 1970-June 1971.

MARKETING PLANS

A. Bufferin

- CX-391 Bufferin 1970 Marketing Plan. Prepared by Ted Bates & Co., October 1969.
- CX-392 Bufferin Supplementary Data for 1970 Marketing Plan. Prepared by Ted Bates & Co., October 1969.
- CX-393 Bufferin 1971 Marketing Plan. Prepared by Ted Bates & Co., October 1971.
- CX-394 1972 Bufferin Marketing Plans Presentation. October 11, 1971.
- CX-395 Bufferin 1973 Marketing Plan. Prepared by Ted Bates & Co., September 1972.
- CX-396 Bufferin Supplementary Data for 1973 Marketing Plan. Prepared by Ted Bates & Co., September 1972.
- CX-397 Bufferin/Arthritis Strength Bufferin 1974 Marketing Plan. Prepared by Ted Bates & Co., October 1973.
- CX-398 Bufferin/Arthritis Strength Bufferin Supplementary Data for 1974 Marketing Plan. Prepared by Ted Bates & Co., October 1973.

Excedrin

- CX-399 Excedrin Brand Review 1968 vs. 1967. First 4 Months 1969 vs. First 4 Months 1968. Prepared by Young & Rubicam, Inc., June 1969.
- CX-400 Excedrin Brand Review 1968 vs. 1967. First 4 Months 1969 vs. First 4 Months 1968. Prepared by Young & Rubicam, Inc., August 1969.
- CX-401 Excedrin Brand Review 1969 vs. 1968. Last 6 Months 1969 vs. Last 6 Months 1968. Prepared by Young & Rubicam, Inc., May 1970.
- CX-402 Excedrin Marketing Plan 1969 Executive Summary. Prepared by Young & Rubicam, Inc., September 1968.
- CX-403 Excedrin Review Board. Prepared by Young & Rubicam, Inc., May 1969.
- CX-404 A Review of Excedrin's Marketing Opportunities. January 1970.
- CX-405 Excedrin 1970 Marketing Plan.
- CX-406 Excedrin 1970 Sales Meeting for Excedrin and Excedrin P.M. Prepared by Young & Rubicam, Inc.
- CX-407 Excedrin 1971 Marketing Plan. Prepared by Young & Rubicam, Inc., September 1970.
- CX-408 Excedrin Exhibits 1971 vs. 1970.
- CX-409 Excedrin Recommendations to Interchange the "Efficacy" and "Total Pain" Campaigns. Prepared by Young & Rubicam, Inc., April 1971.
- CX-410 Excedrin Marketing Plan 1971. Prepared by Young & Rubicam, Inc., August 28, 1970.
- CX-411 Excedrin 1972 Marketing Plan. Prepared by Young & Rubicam, Inc., October 1971.
- CX-412 Excedrin 1972 Brand Review Analysis of 1971 vs. 1970 Performance. Prepared by Young & Rubicam, Inc., April 1972.

CX-413 Excedrin 1973 Marketing Plan Book II.
Prepared by Young & Rubicam, Inc.,
September, 1972.

C. Excedrin P.M.
CX-414 Excedrin P.M. Year I Marketing Plan. Prepared
by Young & Rubicam, Inc., August 1969.

CX-415 Excedrin P.M. Year I Marketing Plan. Test
Market Plan. Prepared by Young & Rubicam,
Inc., January 1969.

CX-416 Excedrin P.M. 1971 Marketing Plan. Prepared
by Young & Rubicam, Inc., September 1970.

CX-417 Excedrin P.M. 1971 Marketing Plan - Charts
of Presentation. Prepared by Young &
Rubicam, Inc., September 1970.

CX-418 Excedrin P.M. 1971 Marketing Plan. Book II -
Exhibits. Prepared by Young & Rubicam,
Inc., September 1970.

CX-419 Excedrin P.M. An Exploration. Prepared by
Young & Rubicam, Inc., October 25, 1971.

CX-420 Excedrin P.M. 4th Quarter Advertising Plans.
Prepared by Young & Rubicam, Inc., July 23, 1971.

CX-421 Excedrin P.M. 1972 Marketing Plan. Prepared
by Young & Rubicam, Inc., October 1971.

CX-422 Excedrin P.M. 1972 Marketing Plan - Charts
of Presentation. Prepared by Young & Rubicam,
Inc., October 1971.

CX-423 Excedrin P.M. 1972 Marketing Plan - Book II.
Prepared by Young & Rubicam, Inc., September 1971.

CX-424 Excedrin P.M. 1974 Marketing Plan.

DOCUMENTS RELATED PRIMARILY TO MEDICAL ISSUES

- CX-425 "A Dose Response and Relative Potency Study of two Non-Narcotic Analgesics" (text of 22 pages), by John P. Emich, Richard H. Schwarz and Fred Mueller (hereafter known as the "Emich study").
- CX-426 "Emich study" (text of 22 pages).
- CX-427 "Emich study" (text of 6 pages).
- CX-428 "Emich study" (text of 12 pages).
- CX-429 "Emich study" (text of 11 pages).
- CX-430 "Obstetric Analgesic Study Data Forms" collected in the "Emich study".
- CX-431 Computer cards containing data collected in the "Emich study". (Cards submitted by Bristol-Myers).
- CX-432 Computer analysis of data collected in the "Emich study." (Analysis submitted by Bristol-Myers).
- CX-433 Two-page curriculum vitae of John P. Emich, Jr.
- CX-434 Nine-page memorandum dated February 24, 1970, from F. W. Mueller to W. B. Elvers entitled "Dr. Emich Analgesic Study W1551 (269 Patients)."
- CX-435 One-page letter dated March 18, 1968, from Walter B. Elvers to Annette Williams, plus four-page attachment to letter entitled "Randomization W1551 - Dr. Emich - 2/28/68".
- CX-436 One-page letter dated September 20, 1968 from Annette B. Williams to Walter B. Elvers.
- CX-437 One-page letter dated December 3, 1968 from Annette B. Williams to Walter B. Elvers.
- CX-438 One-page letter dated January 30, 1969 from Annette B. Williams to Walter B. Elvers.
- CX-439 "Comparison of Effectiveness of Two Analgesic Agents as Determined by Laboratory Testing" (text of 11 pages), by Harold Sherman, Joseph E. Fiasconaro and Harry Grundfest (hereafter known as the "Sherman study").
- CX-440 "A Double Blind Study of the Analgesic Action of Excedrin, ASA and Placebo" (text of 3 pages) by Sherman, Fiasconaro, and Grundfest (hereafter known as the "Sherman study").

- CX-441 "A Double Blind Study of the Analgesic Action of Excedrin. Commercial Aspirin Preparations and Placebo (text of 4 pages), which study was conducted by Harold Sherman, Joseph Fiasconaro and Harry Grundfest (hereafter known as the "Sherman study").
- CX-442 One set of forms containing the responses of subjects participating in the "Sherman study" (submitted in 1966 as A-25, Part II).
- CX-443 Four-page memorandum dated Dec. 22, 1964 from H. Glaser to W. C. Frey, entitled "Pain Threshold Measurement Supplement to W-1309"
- CX-444 Five-page memorandum dated February 6, 1964 from Morton Miller to W. C. Frey, entitled "Pain Threshold Measurements."
- CX-445 Two-page letter dated June 21, 1963, from W. B. Elvers to Joseph Fiasconaro.
- CX-446 Two-page document entitled "Randomization for Dr. Sherman et al. -- W1309," dated June 21, 1963.
- CX-447 One-page letter dated July 10, 1963, from W. B. Elvers to Harry Grundfest, together with attachment, a one-page document entitled "Sequence of Administration -- Experimental Pain Studies -- W1309 -- June 21, 1963."
- CX-448 One-page letter dated July 15, 1963, from Harry Grundfest to W. B. Elvers.
- CX-449 Five-page Memorandum dated October 7, 1964 from W. B. Elvers to B. M. Lanman, entitled "Dr. Sherman's Excedrin Paper."
- CX-450 "A Double Blind Study Re. Analgesic Action of Excedrin, ASA and Placebo", by H. Sherman, J. E. Fiasconaro and H. Grundfest (text of 6 pages), apparently a draft.
- CX-451 One-page memorandum dated July 7, 1971, from F. W. Mueller to W. B. Elvers, entitled "Statistical Services Report on Dr. Sherman Pain Threshold Data B-130."
- CX-452 Two (2) documents submitted in 1966 as B-130. First page entitled "Product Identification, W1242 = Bufferin". Second page entitled "Per Cent Elevation of Pain Threshold -- at Peak ... October 20, 1962."
- CX-453 Eleven-page document entitled "Study of Post-Partum Pain at the Boston Hospital for Women," an interim report written by Gene M. Smith. (The complete study on 765 subjects is known hereafter as the "Smith study.")

- CX-454 Three-page blank "Patient-Response Form" used in the "Smith study".
- CX-455 Computer cards containing data collected in the "Smith study" (785 patients).
- CX-456 Two-page document entitled "Post-Partum Card Layout Sheet", which is the key to the computer cards containing data collected in the "Smith study".
- CX-457 Eight-page document entitled "Bristol-Myers Company presentation on methapyrilene and Excedrin P. M. to the FDA/OTC Review Panel on Sedatives, Tranquilizers and Sleep Aids - November 5, 1973".
- CX-458 Two-page letter dated June 13, 1968, from W. B. Elvers to Mr. Walter E. Law, of the CBS Television Network.
- CX-459 Three-page document entitled "Dr. J. A. Rider, Randomization W-1882, February 15, 1973."
- CX-460 One-page document entitled "Medical Department Study ... Report No. 674 ... Project 12010 ... Study No. W1882."
- CX-461 One-page document entitled "Medical Department Study * Replaces W1933! ... Report No. 681 ... Study No. W1933", and one-page attachment thereto entitled "Dr. Rider -- Randomization W-1938 -- August 27, 1973."
- CX-462 One-page letter dated November 29, 1972, from B. M. Lanman to W. G. Grief, together with two-page attachment entitled "FDA Fact Sheet (April 1972)."
- CX-463 One-page letter dated Feb. 16, 1973, from Walter B. Elvers to John McGarry.
- CX-464 Two-page letter dated October 3, 1959, from Walter B. Elvers to Larry Treger, together with attachments (20 pages).

- CX-465 One-page memorandum dated May 15, 1972, from Walt Smith to Excedrin PM Creative Group, entitled "Medical Questions," together with twelve-page attachment entitled "Excedrin P.M. Hillside Medical Meeting Summary."
- CX-466 Four-page letter dated July 7, 1972, from Ruth M. Palmes to John R. Lewis, Ph.D.
- CX-467 One-page letter dated November 27, 1968, from B.M. Lanman to John Emich.
- CX-468 One-page memorandum dated April 8, 1971 from B.S. DeYoung to B. Lanman, entitled "Annual Analgesics Review," together with six-page attachment.
- CX-469 One-page memorandum dated November 20, 1972 from Peter D. Orshovats to E. Meyer, et al., together with two-page attachment thereto entitled "FDA Fact Sheet" (April 1972).
- CX-470 One-page letter dated April 15, 1971, from E.J. Meyer to R. Mullan, together with fifteen-page attachment consisting of the "Internal Analgesics" section from the Handbook of Non-Prescription Drugs.
- CX-471 One-page memorandum dated July 25, 1972, from B.S. DeYoung to H. Cannistrano, together with three-page attachment.
- CX-472 Two-page letter dated September 16, 1974, from Bruce R. Hafner to Lynne C. McCoy.
- CX-473 Nine-page letter dated November 8, 1969, from B.M. Lanman to Herbert L. Ley, Jr.
- CX-474 Four-page document entitled "Methapyrilene Hydrochloride H.F and Methapyrilene Fumarate," apparently prepared by Monsanto Chemical Company.
- CX-475 Ten-page document entitled "Technical Information ... Methapyrilene," apparently prepared by Abbott Laboratories.
- CX-476 One-page document entitled "Section VI ... Excedrin P.H."
- CX-477 Three-page memorandum dated January 15, 1974, from G.M. Smith to B.M. Lanman.

- CX-478 Twenty-two page document entitled "Salicylamide: A Review of the Literature," by Corinne E. Rennie.
- CX-479 Five-page memorandum dated September 24, 1973, from E. Rose to W.B. Elvers, entitled "Sleep Induction Study W-1863--Project 13020."
- CX-480 Five-page memorandum dated February 4, 1974, from E. Rose to W.B. Elvers, entitled "Sleep Induction Study W-1856-IV--Project 13020."
- CX-481 Two-page document entitled "II. Analgesic Activity, Inhibition of pain produced mechanically in rats," together with attachment thereto, a three-page memorandum dated June 10, 1970, from E. Amoresano to F.W. Mueller entitled "Rat Paw Analgesia Test."
- CX-482 One-page document entitled "Section V. Excedrin P.M."
- CX-483 Two-page document entitled "Section VI. Excedrin P.M.," together with attachments thereto (46 pages).
- CX-484 One-page document entitled "Excedrin P.M., ... 2. Chronic Insomnia Study," together with attachments thereto (38 pages).
- CX-485 One-page memorandum entitled "Excedrin P.M., ... 4. Analgesic/Sedative Study," together with attachments thereto (19 pages).
- CX-486 One-page document entitled "Excedrin P.M., ... 5. Analgesic/Sedative Study," together with attachments thereto (34 pages).
- CX-487 One-page document entitled "Excedrin P.M., ... 6. Analgesic/Sedative Study," together with attachments thereto (12 pages).
- CX-488 One-page document entitled "Excedrin P.M., ... 7. Analgesic/Sedative Study," together with attachments thereto (18 pages).
- CX-489 Two-page document entitled "Federal Register, Vol. 37, No. 92--Thursday, May 11, 1972."
- CX-490 Three-page document from Federal Register Vol. 37., No. 2--Wednesday, January 5, 1972 (pages 85--87).
- CX-491 One-page document stating, in its entirety, "Gerhard Levy, PhD, Personal Communication by telephone."

- CX-492 One-page memorandum dated November 11, 1969, from D. Mullan to R. Sawyer, entitled "Medical Studies on Gastric Irritation from Aspirin," together with attachment (1 page).
- CX-493 One-page memorandum dated October 18, 1968, from R. Sawyer to Messrs. Loomis, Mullan, Meloy and Boullet, entitled "New York Times Article," together with attachment (2 pages).
- CX-494 One-page letter dated February 11, 1971, from D. Bell to J. Lehmann, together with attachment (3 pages).
- CX-495 One-page letter dated February 6, 1970 from Al Nichols to J. Lehmann, together with attachment (4 pages).
- CX-496 Five-page document entitled "A Review of the Excedrin R & D Meeting - January 9, 1970."
- CX-497 One-page letter dated November 30, 1972 from F. Goldberg to B. DeYoung, together with attachment (4-page Saturday Review article).
- CX-498 Four-page memorandum dated December 11, 1959, from Allegra Rodgers to C.H. Frey, entitled "Dr. Paul's Blood Levels."
- CX-499 Three-page memorandum dated April 19, 1968, from M. Glaser to F.W. Mueller, entitled "Dr. Paul's Salicylate Blood Level Quarterly Comparison."
- CX-500 Three-page memorandum dated June 26, 1968, from M. Glaser to F.W. Mueller, entitled "Dr. Paul's Salicylate Blood Level Quarterly Comparison."
- CX-501 Six-page memorandum dated April 17, 1960, from F.W. Mueller to W.B. Elvers, entitled "Analgesic Study W1554."
- CX-502 Four-page memorandum dated October 10, 1967, from M. Glaser to F.W. Mueller, entitled "Special Blood Level Comparison."

- CX-503 Four-page memorandum dated June 20, 1972, from E. Rose to W.B. Elvers entitled "Sleep Induction Study W-1723, Project 13020."
- CX-504 Three-page memorandum dated September 19, 1973, from E. Rose to W.B. Elvers, entitled "Gastric Tolerance Study W-1882, Project 12010."
- CX-505 Three-page memorandum dated November 19, 1973, from E. Rose to W.B. Elvers, entitled "Gastric Tolerance Study W-1938, Project 12010."
- CX-506 Volumes I - IV of Bristol-Myers Company's "Report to Food & Drug Administration," dated September 19, 1972, and dealing with analgesic products.
- CX-507 Two-page document dated May 31, 1973, entitled "Summary - Study of Gastrointestinal Tolerance for Aspirin Preparations Conducted for Bristol-Myers Company. Ivy Protocol Number 2818," written by Herbert W. Copelan, M.D., together with attachment (4 pages).
- CX-508 One-page untitled memorandum dated April 2, 1969, from B.M. Lanman to D. Carrothers.
- CX-509 Two-page memorandum dated November 25, 1969, from W.B. Elvers to J.M.L. Brunskill, entitled "Analgesic Tablets (Excedrin) Malaysia and Singapore."
- CX-510 The Medical Letter on Drugs and Therapeutics, Vol. 16, No. 14 (Issue 104). July 5, 1974, pages 57-59.
- CX-511 National Academy of Sciences - National Research Council; report of evaluation of Bufferin conducted by Panel on Drugs for Relief of Pain and Panel on Drugs Used in Rheumatic Diseases, together with "General Statement on Analgesic Preparation" and "Reasons for omitting from the proposed OTC mild analgesic labeling certain indications currently present in the labeling of one or more such products."
- CX-512 AMA Drug Evaluations - Second Edition 1973, evaluated by the AMA Council on Drugs, American Medical Association, Chapter 22, "Mild Analgesics," pp. 261-276.

- CX-513 Federal Register, Vol. 40, No. 236 - Monday,
December 8, 1975, pp. 57292-57329. ("Proposal
to Establish Monographs for OTC Nighttime
Sleep-Aid, Daytime Sedative, and Stimulant
Products.")
- CX-514 Reserved for the report of the Panel on Over-the-
Counter Internal Analgesics, Food & Drug Admini-
stration.
- CX-515 One-page letter dated September 25, 1968,
from W.B. Elvers to I. Botwinick.
- CX-516 One-page document entitled "Medical Department
Study...Source: Medical Dept...Project: 12030...
Study No. W 1585."
- CX-517 Thirty-page document entitled "Simple Headache
Study W1585 conducted for Bristol-Myers Products
Division."
- CX-518 AMA Drug Evaluations - First Edition 1971,
evaluated by the AMA Council on Drugs, American
Medical Association, Chapter 22, "Mild Analgesics,"
pp. 177-188.
- CX-519 Two-page letter dated August 27, 1974 from
G. Guttman to L. McCoy.
- CX-520 One-page letter dated October 11, 1974 from
G. Guttman to L. McCoy.
- CX-521 Materials contained in Folder A-23, submitted
by Bristol-Myers in 1966.
- CX-522 Materials contained in Folder B-65, submitted
by Bristol-Myers in 1966.
- CX-523 Materials contained in Folder A-1, submitted
by Bristol-Myers in 1966.
- CX-524 Materials contained in Folder A-3, submitted
by Bristol-Myers in 1966.
- CX-525 Materials contained in Folder B-36, submitted
by Bristol-Myers in 1966.

- CX-526 Materials contained in Folder B-37, submitted by Bristol-Myers in 1966.
- CX-527 Materials contained in Folder B-45, submitted by Bristol-Myers in 1966.
- CX-528 Materials contained in Folder B-99, submitted by Bristol-Myers in 1966.
- CX-529 Materials contained in Folder B-101, submitted by Bristol-Myers in 1966.
- CX-530 Materials contained in Folder A-26, submitted by Bristol-Myers in 1966.
- CX-531 Computer cards, analyses and various worksheets and other data related to Folder A-26, all of which was transmitted by letter of August 27, 1974 from G. Guttman to L. McCoy (under separate cover).
- CX-532 Letter from Jay S. Davis to Thomas J. Donegan, Jr., dated June 14, 1972, with attachments.
- CX-533 Letter from Gilbert H. Weil to Thomas J. Donegan, Jr., dated July 21, 1972, with attachments.
- CX-534 Letter from Bruce R. Hafner to Lynne C. McCoy, dated September 9, 1974.
- CX-535 Subpoena duces tecum addressed to R.L. Gelb, President, Bristol-Myers Co., dated January 15, 1971.
- CX-536 Subpoena duces tecum addressed to R.L. Gelb, President, Bristol-Myers Co., dated February 7, 1974.

- CX-537 Two-page memorandum dated September 23, 1959, from W.C. Frey to G.L. Wolcott, entitled "Bufferin versus Bayer Aspirin (Dr. Paul)".
- CX-538 Materials contained in Folder B-86, submitted in 1966.
- CX-539 Four-page memorandum dated January 19, 1960, from A.H. Rodgers to G.H. Frey, entitled "Dr. Paul's Blood Levels Fourth Quarter Bufferin Production."
- CX-540 Materials contained in Folder B-94, submitted in 1966.
- CX-541 Three-page memorandum dated March 29, 1961, from A.H. Rodgers to R. John, entitled "Dr. Paul's Salicylate Blood Level Evaluations."
- CX-542 Materials contained in Folder B-105, submitted in 1966.
- CX-543 Two-page memorandum dated January 6, 1962, from A.H. Rodgers to R. John, entitled "Dr. Paul's Quarterly Salicylate Review of Bufferin."
- CX-544 Materials contained in Folder B-117, submitted in 1966.
- CX-545 Two-page memorandum dated August 30, 1962, from A.H. Rodgers to B.M. Lannan, entitled "Dr. Paul's Quarterly Comparison of Salicylate Blood Levels G-1246."
- CX-546 Materials contained in Folder B-127, submitted in 1966.
- CX-547 Five-page memorandum dated July 11, 1968, from K.J. Melman to V.F. Cotty, entitled "Bufferin-Bayer Blood Panel."
- CX-548 Four-page memorandum dated June 20, 1968, from K.J. Melman to V.F. Cotty, entitled "Bufferin Blood Panel."

CX-549 "Final Report - A Clinical and Statistical Study of Blood Salicylate Levels Following the Ingestion of Two Preparations Containing Aspirin," September 1962, prepared by Stanford Research Institute (SRI Project No. 3938).

CX-550 "Final Report - Clinical and Statistical Studies of Blood Salicylate Levels," April 10, 1959, prepared by Stanford Research Institute (SRI Project No. S-2544).

MISCELLANEOUS DOCUMENTS

- CX-551 Two page letter with five page attachment from Young & Rubicam to Derrick Van Nimwegan, dated September 13, 1965.
- CX-552 One page memorandum with five page attachment, from J.J. Sheedy to B. DeYoung, dated October 22, 1968.
- CX-553 Two page letter from Anne Weitz of Ted Bates & Co., Inc., to Robert Parcher, ASI, dated December 2, 1968.
- CX-554 One page memorandum from Dick Mullan to Les Richter, dated January 20, 1969.
- CX-555 Three page letter from Anne Weitz of Ted Bates, Inc. to T.L. Susman, dated January 27, 1969.
- CX-556 One page memorandum from Don Cragin to Killian, Azorin, Barth, Berke, DeSimone, Hawkey, and Stamps, dated February 13, 1969.
- CX-557 One page memorandum with two page attachment from Ben DeYoung to J.J. Sheedy, dated March 3, 1969.
- CX-558 Four page memorandum from H.J. Head to B. DeYoung, dated March 6, 1969.
- CX-559 One page memorandum from D. Mullan to B. Ballister, R. Romano, D. Cragin, H. Azorin, N. Berke, and B. Hawkey, dated March 25, 1969.
- CX-560 One page memorandum from Buck Meloy to Mr. Loomis, dated March 25, 1969.
- CX-561 One page memorandum with three page attachment from Dick Mullan to Harry Azorin, dated April 18, 1969.
- CX-562 Five page letter with 2 page attachment from Anne Weitz to Stephen Kutler, dated April 29, 1969.
- CX-563 One page memorandum with fifteen page attachment from Dick Mullan to H. Azorin, C. DeSimone, B. Ferretti, B. Hawkey, J. Hodges, and J. Stamps, dated May 6, 1969.

- CX-564 Three page memorandum from Ben DeYoung to J.J. Sheedy, dated May 7, 1969.
- CX-565 One page letter with fifteen page attachment from Dick Mullan to Stephen Kutler, dated June 3, 1969.
- CX-566 Two page memorandum from J.J. Sheedy to Ben DeYoung, dated June 6, 1969.
- CX-567 One page memorandum with three page attachment from Ben DeYoung to J.J. Sheedy, dated June 16, 1969.
- CX-568 One page memorandum with one page attachment from D. Mullan to H. Azorin, dated June 16, 1969.
- CX-569 One page memorandum with two page letter (dated June 16, 1969 from S. K. to DeYoung, with five page attachment) from Ben DeYoung to J.J. Sheedy, dated June 18, 1969.
- CX-570 One page memorandum from Ben DeYoung to F.K. Mayers, dated June 19, 1969.
- CX-571 One page letter with twenty-four page attachment from Dick Mullan to Stephen Kutler, dated June 27, 1969.
- CX-572 Two page letter with four page attachment from Anne Weitz to Stephen Kutler, dated July 17, 1969.
- CX-573 One page memorandum with two page attachment from Melvin Harbinger to Stephen Kutler, dated July 23, 1969.
- CX-574 Two page memorandum from Dick Mullan to Harry Azorin and Buck Meloy, dated August 4, 1969.
- CX-575 One page memorandum with two page attachment from E.J. Meyer to J.J. Sheedy, dated August 6, 1969.
- CX-576 Two page memorandum with five page attachment from M. Harbinger to David Ruckert, dated August 8, 1969.
- CX-577 One page memorandum with two page attachment from Melvin Harbinger to David Ruckert, dated August 11, 1969.
- CX-578 One page memorandum from Melvin Harbinger to David Ruckert, dated August 15, 1969.

- CX-579 Five page memorandum with seventeen page attachment from Melvin Harbinger to David Ruckert, dated August 15, 1969.
- CX-580 Two page memorandum from Excedrin Brand Group from F.K. Mayers, dated August 19, 1969.
- CX-581 One page memorandum from Dick Mullan to P. Verhine and B. Carter, dated August 21, 1969.
- CX-582 One page memorandum with two page attachment from Melvin Harbinger to Berdy, Brown, DeYoung, Mayers, Ruckert, Sheedy, Taft, Belden, McGarry, Morris and Spangenberg, dated September 3, 1969.
- CX-583 One page memorandum with three page attachment from Ben S. DeYoung to J.J. Sheedy, dated September 5, 1969.
- CX-584 One page memorandum from Melvin Harbinger to Edward Meyer, dated September 25, 1969.
- CX-585 Memorandum with ten page attachment from Dick Mullan to Anne Weitz, dated October 8, 1969.
- CX-586 One page memorandum from Ben DeYoung to F.K. Mayers, dated October 21, 1969.
- CX-587 One page memorandum from Melvin Harbinger to John Horvitz, dated October 31, 1969.
- CX-588 One page memorandum from Melvin Harbinger to Edward Meyer, dated October 31, 1969.
- CX-589 Three page memorandum from Edward Meyer to John Sheedy, dated November 11, 1969.
- CX-590 Three page memorandum from Ben DeYoung to J.J. Sheedy, dated November 17, 1969.
- CX-591 One page memorandum from Ben DeYoung to J.J. Sheedy, dated November 26, 1969.
- CX-592 Four page letter from T. Spangenberg to B. DeYoung, dated December 4, 1969.
- CX-593 One page memorandum with four page attachment from Ben DeYoung to F.K. Mayers, dated December 15, 1969.
- CX-594 One page memorandum from Ben DeYoung to J.J. Sheedy, dated January 6, 1970.

- CX-595 One page memorandum with four page letter and seven page report attached, from Ben DeYoung to F.K. Mayers, dated January 22, 1970.
- CX-596 One page memorandum from Ben DeYoung to J.J. Sheedy, dated February 8, 1970.
- CX-597 One page letter from McGarry to J. Lehmann with five page attachment, dated February 13, 1970.
- CX-598 One page memorandum from E.J. Mayer to DeYoung and Lehmann, dated February 18, 1970.
- CX-599 Three page memorandum from Edward Meyer to John Sheedy, dated March 25, 1970.
- CX-600 One page memorandum with two page attachment from Edward Meyer to Peter Spengler, dated March 25, 1970.
- CX-601 Ted Bates Report of Conference with Mr. Meyer (of Bristol-Meyers) and Gury, Abrams, Azorin, Chernoff, Loomis, Mullan and Schwartz (of Ted Bates) (two pages), dated March 26, 1970.
- CX-602 Five page memorandum from Melvin Harbinger to Ben DeYoung, dated April 1, 1970.
- CX-603 Two page memorandum with three page attachment from Edward Meyer to John Sheedy, dated April 21, 1970.
- CX-604 Ted Bates Report of Conference with Mayers, Sheedy, Meyer and Stone (of Bristol-Meyers) and Loomis, Romano and Sawyer (of Ted Bates) (three pages), dated May 6, 1970.
- CX-605 One page memorandum with two page attachment from Ben DeYoung to J.J. Sheedy, dated June 17, 1970.
- CX-606 One page memorandum with five page attachment from Ben DeYoung to J.J. Sheedy, dated July 2, 1970.
- CX-607 Ted Bates Report of Conference with Meyer and Stone (of Bristol-Meyers) and Romano, Mullan, Azorin, Chernoff, Sawyer, and E. Williams (of Ted Bates) (three pages), dated July 2, 1970.
- CX-608 One page memorandum with fifteen page attachment from Anne Weitz to Allan Chernoff dated July 6, 1970.
- CX-609 One page memorandum from Rich Sawyer to Anne Weitz, dated July 7, 1970.

CX-610 Two page memorandum from Ben DeYoung to J.J. Sheedy, dated July 23, 1970.

CX-611 One page memorandum from Edward Meyer to John Sheedy, dated August 7, 1970.

CX-612 One page memorandum with eight page attachment from Ben DeYoung to John and Neil, dated August 10, 1970.

CX-613 One page memorandum with one page attachment from Ben DeYoung to J.J. Sheedy, dated September 3, 1970.

CX-614 One page memorandum with seven page attachment from J. Margolis to Makrianes, Belden, McGarry, Nichols and Bell, dated September 15, 1970.

CX-615 One page memorandum with two page attachment from Jane Levenson to John McGarry, dated September 9, 1970.

CX-616 One page memorandum with two page letter attached from Edward Meyer to John Sheedy, dated September 16, 1970.

CX-617 Three page letter with three page attachment from D. Bell to J. Lehmann, dated September 21, 1970.

CX-618 One page memorandum with one page attachment from Ben DeYoung to T.F. Oosterle, dated September 22, 1970.

CX-619 Ted Bates & Co. Conference Report with Meyer and Stone (of Bristol-Myers) (one page), dated September 28, 1970.

CX-620 Two page memorandum from Ben DeYoung to H.D. Harbinger, dated September 28, 1970.

CX-621 Ted Bates Report of Conference with Loomis, Romano, Mullan and Ferritti (of Ted Bates) and Meyer and Stone (of Bristol-Myers) (three pages), dated October 9, 1970.

CX-622 One page memorandum from Ben DeYoung to J.J. Sheedy, dated October 16, 1970.

CX-623 Four page memorandum from M. Harbinger to Lehman, dated October 19, 1970.

CX-624 Two page memorandum from Edward Meyer to John Sheedy, dated October 27, 1970.

CX-625 One page memorandum from Melvin Harbinger to R.J. Stone, dated October 29, 1970.

CX-626 Ted Bates Report of Conference with Loomis, Romano, Mullan and Azorin (of Ted Bates) and Sheedy, Meyer and Stone (of Bristol-Myers) (one page), dated November 4, 1970.

CX-627 Two page memorandum with one page attachment from Ben DeYoung to F.K. Mayers, dated December 3, 1970.

CX-628 Two page letter from Mc Garry to G.W. Lehmann, dated December 3, 1970.

CX-629 Two page memorandum from Ben DeYoung to F.K. Mayers, dated December 28, 1970.

CX-630 One page memorandum with three page letter attached from Edward Meyer to John Sheedy, dated February 22, 1971.

CX-631 Seventeen page document titled Excedrin and Excedrin P.M. Copy Strategies 1969-1971. Prepared by Young and Rubicam; dated February 25, 1971.

CX-632 One page letter from Jane Levenson to Elaine Read, dated May 11, 1971.

CX-633 One page memorandum with six page attachment from Melvin Harbinger to R.J. Stone, dated May 21, 1971.

CX-634 Two page memorandum from Melvin Harbinger to J.J. Sheedy, dated June 4, 1971.

CX-635 Ted Bates Report of Conference with Mayers, Sheedy, Meyer and Stone (of Bristol-Myers) and Loomis, Romano, Azorin and Sawyer (of Ted Bates) (two pages), dated June 8, 1971.

CX-636 Two page memorandum from Ben DeYoung to F.K. Mayers, dated June 29, 1971.

CX-637 One page memorandum from M. Harbinger to F.K. Mayers, dated August 2, 1971.

CX-638 One page memorandum with fifteen page attachment from Ben DeYoung to J.J. Sheedy, dated August 3, 1971.

CX-639 Three page (partially expunged) memorandum with five page attachment from Edward Meyer to John Sheedy, dated November 12, 1971.

- CX-640 Two page memorandum with two page attachment from B. DeYoung to F.K. Meyers, dated May 9, 1972.
- CX-641 Two page memorandum from Nicholas Cannistraro to M. Barton, V. Lester, E. Meyer, J. Morano, and J. Strickle, dated November 16, 1972.
- CL-642 One page memorandum with two page attachment from J. Lehmann to Dr. P. Orahovats dated December 13, 1972.
- CX-643 One page memorandum with three page attachment from Nicholas Cannistraro to John Sheedy, dated February 27, 1973.
- CX-644 Ted Bates Report of Conference with Sheedy, Meyer, Cannistraro and Ms. Lewis (of Bristol-Myers) and Romano, Azorin, Mullan, Bishop and Sawyer (of Ted Bates) (two pages), dated May 24, 1973.
- CX-645 Four page letter from J. Lehmann to F. Goldberg, dated August 31, 1973.
- CX-646 One page memorandum with three page attachment from John Sheedy to Peter Orahovats, dated November 2, 1973.
- CX-647 Thirty-one page Excerpta P.M. Agency White Paper prepared by Young and Rubicam, dated February 1974.
- CX-648 Four page memorandum with eleven page attachment from Anne Weitz to Rich Sawyer, dated February 25, 1974.
- CX-649 Two page letter from Marshall Beil, Esq. to Lynne C. McCoy, Esq., dated January 2, 1975.
- CX-650 Two page letter with fifteen page attachment from Marshall Beil to Charles Ludlum, dated February 7, 1975.
- CX-651 One page letter with two page attachment from Marshall Beil to Charles Ludlum, dated February 24, 1975.
- CX-652 One page memo from E. Meyer to F. Meyers with 2 page attachment dated January 27, 1972.
- CX-653 Ted Bates Report of Conference with Meyers, Sheedy, Meyer and Cannistraro dated August 3, 1972 (three pages).
- CX-654 Two page memorandum from Meyer to Sheedy drafted August 21, 1972 to which is attached a three page letter and a nine page memo.

- CX-655 Four page Response with three exhibits of Ted Bates & Company to 1974 FTC Subpoena Specification No. 1.
- CX-656 Four page Response of Young & Rubicam to 1974 FTC Subpoena Specification No. 1(d). (Young & Rubicam #363-366).
- CX-657 Two page Response of Young & Rubicam to 1974 FTC Subpoena Specification No. 1(e) dated August 1974 (Young & Rubicam Document #367-368).
- CX-658 One page Response of Young & Rubicam to 1974 FTC Subpoena Specification No's 1(g) and 1(h) dated September 1974 (Young & Rubicam Document #1143).
- CX-659 One page Response of Young & Rubicam to 1974 FTC Subpoena Specification 1(j) dated October 1974 (Y & R Document # 36).
- CX-660 Six page Response of Bristol-Myers to 1974 FTC Subpoena Specifications 9(a), 9(b), 9(c) & 9(d) received with covering letter of August 16, 1974.
- CX-661 Three one-page tables submitted by Bristol-Myers in response to 1971 FTC Section Six(b) Order to File Special Report which indicate sales volume, price per bottle and advertising expenditures for Bufferin, Excedrin and Excedrin P.M. for 1960-1970. One page certification of John J. Sheedy attached.
- CX-662 Ten page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 3 which contains lists of spot television advertisements for Bufferin and number of spot television advertisements per quarter for 1969 and 1970 for Bufferin.
- CX-663 Ten page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 which contains lists of spot television advertisements for Excedrin and number of spot television advertisements per quarter for 1969 and 1970 for Excedrin.
- CX-664 Ten page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 3 which contains lists of spot television advertisements for Excedrin P.M. and number of spot television advertisements per quarter for 1969 and 1970 for Excedrin P.M.

- X-665 Seventeen page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 which contains lists of network television advertisements for Bufferin and number of network television announcements per quarter for 1969 and 1970 for Bufferin.
- IX-666 Thirteen page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 which contains lists of network television advertisements for Excedrin and number of network television announcements per quarter for 1969 and 1970 for Excedrin.
- CX-667 Six page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 which contains lists of network television advertisements for Excedrin P.M. and number of network television announcements per quarter for 1969 and 1970 for Excedrin P.M.
- CX-668 Five page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 which contains lists of spot radio commercials for Bufferin and the approximate number of radio spots per market per quarter of 1969 and 1970 for Bufferin.
- CX-669 Three page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 which contains lists of spot radio commercials for Excedrin and the approximate number of radio spots per market per quarter of 1969 and 1970 for Excedrin.
- CX-670 Eight page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 containing dissemination of print advertisements for Bufferin in magazines per quarter for 1969 and 1970.
- CX-671 Eight page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 containing dissemination of print advertisements for Excedrin in magazines per quarter for 1969 and 1970.
- CX-672 Eight page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 containing dissemination of print advertisements for Excedrin P.M. in magazines per quarter for 1969 and 1970.
- CX-673 Four page document submitted by Bristol-Myers in response to 1971 Subpoena containing lists of Bufferin newspaper advertisements disseminated from the third quarter of 1969 through 1970.
- CX-674 Ten page document submitted by Bristol-Myers in response to 1971 Subpoena Specification 8 containing lists of Excedrin

newspaper advertisements disseminated from the first quarter 1969 through the fourth quarter 1970.

CX-675 Ten page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 8 containing lists of Excedrin P.M. newspaper advertisements disseminated from the first quarter 1969 through the fourth quarter 1970.

CX-676 Ten page document submitted by Bristol-Myers in response to 1971 FTC Subpoena Specification 11.

CURRICULA VITAE

CK-677	<u>Curriculum Vitae</u> of	Colin R. Brown
CK-678	<u>Curriculum Vitae</u> of	William H. Forrest, Jr.
CK-679	<u>Curriculum Vitae</u> of	Raymond W. Houde
CK-680	<u>Curriculum Vitae</u> of	Charles G. Moertel
CK-681	<u>Curriculum Vitae</u> of	Jack R. Leonards
CK-682	<u>Curriculum Vitae</u> of	Edward R. Garrett
CK-683	<u>Curriculum Vitae</u> of	Karl Rickels
CK-684	<u>Curriculum Vitae</u> of	Morton I. Grossman
CK-685	<u>Curriculum Vitae</u> of	Rene Menguy
CK-686	<u>Curriculum Vitae</u> of	Donald D. Stevenson
CK-687	<u>Curriculum Vitae</u> of	Daniel L. Azarnoff
CK-688	<u>Curriculum Vitae</u> of	Richard S. Farr
CK-689	<u>Curriculum Vitae</u> of	Harold Aaron
CK-690	<u>Curriculum Vitae</u> of	Sidney Riegelman
CK-691	<u>Curriculum Vitae</u> of	C. Richard Chapman
CK-692	<u>Curriculum Vitae</u> of	Frederick J. Evans
CK-693	<u>Curriculum Vitae</u> of	Richard A. Sternbach
CK-694	<u>Curriculum Vitae</u> of	Byron Wm. Brown, Jr.
CK-695	<u>Curriculum Vitae</u> of	Stanley L. Wallenstein
CK-696	<u>Curriculum Vitae</u> of	Gene H. Smith
CK-697	<u>Curriculum Vitae</u> of	J. Alfred Rider

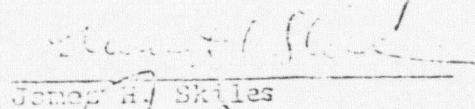
CX-698 Curriculum vitae of William L. Winkle, Ph.D.
CX-699 Curriculum vitae of Ivan Ross, Ph.D.
CX-700 Curriculum vitae of Joel Cohen, Ph.D.
CX-701 Curriculum vitae of Clark Lewitt, Ph.D.
CX-702 Curriculum vitae of Irving Crespi, Ph.D.
CX-703 Curriculum vitae of Michael Eay, Ph.D.
CX-704 Curriculum vitae of Harry Davis, Ph.D.
CX-705 Curriculum vitae of Peter H. Rossi, Ph.D.
CX-706 Curriculum vitae of Frank M. Bass, Ph.D.

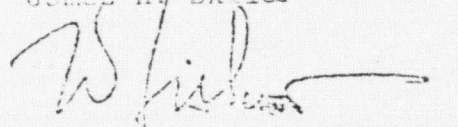
GENERAL NOTE

It should be noted that the Food and Drug Administration's OTC Panel on Internal Analgesics is currently working on evaluations of analgesic products including those which are part of this case. Should their report be issued prior to the commencement of hearings in this matter, complaint counsel intend to introduce relevant portions of that report (CX-514) into the record in this proceeding through the appropriate expert witness or witnesses who have been involved in the Panel's deliberations and evaluations.

Respectfully Submitted,


Lyne C. McCoy

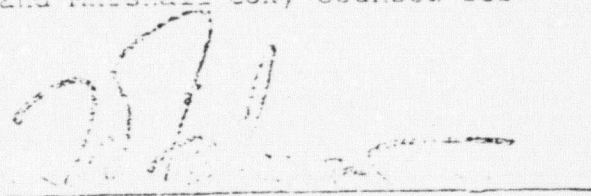

James H. Skiles


W. Benjamin Fisher
Complaint Counsel

Dated: December 31, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all other parties to this proceeding by hand delivery of the original and requisite number of copies to the Office of the Secretary, Federal Trade Commission, and by mailing copies thereof to Gilbert H. Weil, counsel for Bristol-Myers Company, Sidney S. Rosdeitcher, counsel for Young & Rubicam, International, Inc., and Marshall Cox, counsel for Ted Bates & Company, Inc.



W. Benjamin Fisherow
Complaint Counsel

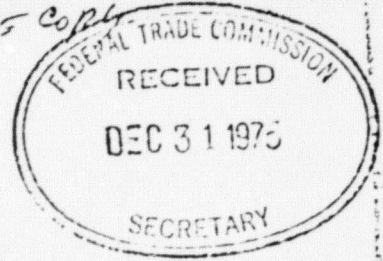
Dated: December 31, 1975

Exhibit XIII

-310a-

Exhibit XIII

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED BATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

TO: The Honorable Montgomery K. Hyun
Administrative Law Judge

WITNESS LIST

Complaint counsel hereby submit their list of witnesses who are expected to testify in this matter and a summary of the scope of each prospective witness' testimony.

1. Colin R. Brown, M.D.
Veterans Administration Hospital
Palo Alto, California 94305
2. William H. Forrest, Jr. M.D.
IDS Coordinator
Center for the IDS
703 Welch Road
Suite F-1
Stanford University Medical Center
Stanford, California 94305
3. Raymond W. Houde, M.D.
Sloan-Kettering Institute for Cancer Research
410 E. 68th Street,
New York, New York 10021
4. Charles G. Moertel, M.D.
Mayo Clinic
Rochester, Minnesota 55901

Drs. Brown, Forrest, Houde and Moertel are all experts in the field of clinical testing of analgesic drugs. Their qualifications and experience are set forth in CX-677 (Dr. Brown); CX-678 (Dr. Forrest); and CX-679 (Dr. Houde); and CX-680 (Dr. Moertel).

Each of them will testify, on the basis of his knowledge and experience, concerning pain, the treatment of pain, and the therapeutic efficacy, comparative therapeutic efficacy and side effects of mild analgesics, including Excedrin, Bufferin and Excedrin P.M., and the active ingredients thereof. Each will testify regarding the need for clinical studies to evaluate the efficacy and comparative efficacy of analgesic drugs and will discuss the criteria for such clinical studies as would be necessary to support claims of comparative efficacy for such drugs. Each will testify regarding the

validity of other types of scientific testing of analgesics, including blood level studies, to make determinations concerning the efficacy and comparative efficacy of those drugs. Each will testify as to the state of opinion among experts regarding the comparative efficacy of Excedrin, Bufferin, Excedrin P.M. and other non-prescription analgesic products, and will give his own expert opinion as to the efficacy and relative efficacy of Excedrin, Bufferin and Excedrin P.M. Each will analyze clinical studies done on Excedrin and Excedrin P.M. (both published and unpublished), which evaluated the comparative efficacy of those products, aspirin and/or placebo. Each will also testify concerning the validity of the methodology and conclusions of such studies.

5. Jack R. Leonards, M.D., Ph.D.
Department of Biochemistry
Case-Western Reserve University
Cleveland, Ohio

Dr. Leonards is an expert in the bioavailability, efficacy and side effects of analgesics. His qualifications and experience are set forth in CX-681. He will testify concerning the bioavailability of aspirin in products such as Bufferin and will testify as to factors involved in bioavailability of these drugs such as disintegration, dissolution and absorption. He will testify on the relationship between blood levels

of an analgesic and relief of pain, including the onset or degree of relief. He will also testify, on the basis of his opinion and the state of expert opinion in general, as to the efficacy and comparative efficacy of Bufferin and other non-prescription analgesics, as well as to the side effects and comparative side effects of Bufferin and other non-prescription analgesics.

6. Edward R. Garrett, Ph.D.
College of Pharmacy
J. Hillis Miller Medical Center
University of Florida
Gainesville, Florida

Dr. Garrett is a recognized expert in the bioavailability of analgesic products. His qualifications and experience are set forth in CX-682. He will testify concerning the bioavailability of aspirin in products such as Bufferin and will testify as to the factors involved in bioavailability of these drugs such as disintegration, dissolution and absorption. He will testify on the relationship between blood levels of an analgesic and relief of pain, including the onset and degree of relief. He will also testify, on the basis of his opinion and the state of expert opinion in general, as to the efficacy and comparative efficacy of Bufferin and other non-prescription analgesics.

7. Karl Rickels, M.D.
203 Piersol Building
University of Pennsylvania Hospital
3600 Spruce Street
Philadelphia, Pennsylvania 19104

Dr. Rickels is a professor in both the Department of Psychology and the Department of Pharmacology at the University of Pennsylvania and is Chairman of the OTC Sedatives, Tranquilizers and Sleep Aids Review Panel of the Food and Drug Administration. His qualifications and experience are set forth in CX-683. He will testify, on

the basis of his own opinion and expert opinion in general, regarding the effectiveness of Bufferin, Excedrin and Excedrin P.M., and their individual components, in the relief of tension. He will also testify, on the basis of his own opinion and expert opinion in general, as to the sedative, somnafacient and hypnotic properties and effects of Bufferin, Excedrin and Excedrin P.M., and will testify concerning studies (both published and unpublished) which purportedly measured such properties and effects of said products.

8. Morton I. Grossman, M.D., Ph.D.
Coordinator for Gastroenterology
School of Medicine
University of California at Los Angeles
Los Angeles, California

Dr. Grossman is a Professor of Medicine and Physiology at UCLA and is an expert in gastroenterology. His qualifications and experience are set forth in CX-684. He will testify as to the potential side effects of aspirin and caffeine and as to the possible dangers of taking aspirin or caffeine to persons who have certain disease conditions. He will testify, on the basis of his opinion and expert opinion in general, as to the side effects and comparative side effects of Bufferin and other non-prescription analgesics. He will also analyze a number of studies (both published and unpublished) which compared the side effects of Bufferin and other non-prescription drugs, and will testify concerning the validity

of the methodology and conclusions of such studies. Dr. Grossman will also testify on the basis of his clinical experience as to the numbers of persons who do not realize that Excedrin, Bufferin and Excedrin P.M. contain aspirin.

9. Rene Menguy, M.D.
Surgeon-in-Chief
The Genese Hospital
224 Alexander Street
Rochester, New York 14607

Dr. Menguy is a surgeon and is an expert in the side effects of aspirin, particularly in the harmful effects that aspirin products can have on the stomach. His qualifications and experience are set forth in CX-685. Dr. Menguy will testify as to the potential side effects of aspirin and the more serious hazards that aspirin can pose to certain categories of persons. He will testify, on the basis of his opinion and expert opinion in general, as to the side effects and comparative side effects of Bufferin and other non-prescription analgesics. He will also analyze a number of studies (both published and unpublished) which compared the side effects of Bufferin and other non-prescription drugs, and will testify concerning the validity of the methodology and conclusions of such studies.

10. Donald D. Stevenson, M.D.
Division of Allergy
Scripps Clinic
476 Prospect Street
LaJolla, California 92037

Dr. Stevenson is an expert in the potential side effects and hazards of aspirin. His qualifications and experience are set forth in CX-686. He will testify as to the potential side effects of aspirin and will testify from his own clinical experience as to the extreme hazards which aspirin poses to persons with asthmatic reactions to the drug. He will testify from his clinical experience as to the number of persons who are unaware that Excedrin, Bufferin, Excedrin P.M. and other heavily advertised non-prescription analgesics contain aspirin.

11. Daniel L. Azarnoff, M.D.
Professor of Medicine and
Pharmacology
University of Kansas Medical Center
Kansas City, Kansas

Dr Azarnoff is an expert in the evaluation of the efficacy of analgesic drugs and their side effects. He was a member of the American Medical Association's Council on Drugs for 1970, which prepared the 1971 edition of AMA Drug Evaluations, and he was a Consultant for the 1973 edition of AMA Drug Evaluations. His qualifications and experience are set forth

in CX- 687 . He will testify on the basis of his knowledge and experience concerning pain and the treatment of pain, and concerning the therapeutic efficacy, comparative therapeutic efficacy, and side effects of mild analgesics, including Excedrin, Bufferin and Excedrin P.M. He will testify regarding the need for clinical studies to evaluate the efficacy and comparative efficacy of analgesic drugs and will discuss the criteria for such clinical studies as would be necessary to support claims of comparative efficacy for such drug products. He will comment on the validity of other types of scientific testing of analgesics, including blood level studies, to make determinations concerning the efficacy and comparative efficacy of these drugs. He will testify as to the state of opinion among experts regarding the comparative efficacy of Excedrin, Bufferin, and other non-prescription drugs. In this regard he will explain the process by which the AMA Council of Drugs and the AMA Department of Drugs arrived at their evaluations of mild analgesics contained in CX-512 and CX-518 . He will also give his own expert opinion concerning the efficacy and relative efficacy of Excedrin, Bufferin and Excedrin P.M.

12. Richard S. Farr, M.D.
National Jewish Hospital
and Research Center
3800 East Colfax Avenue
Denver, Colorado 80206

Dr. Farr is an expert in allergies resulting from aspirin and in the hazardous side effects of aspirin. His qualifications and experience are set forth in CX-688. He will testify as to the side effects of aspirin and as to the potential hazards of aspirin ingestion for certain categories of persons. He will testify, from his own clinical experience, as to the lack of knowledge among consumers that Excedrin, Bufferin, Excedrin P.M., and other heavily advertised over-the-counter analgesics contain aspirin.

13. Harold Aaron, M.D., Editor
The Medical Letter on Drugs and Therapeutics
56 Harrison Street
New Rochelle, New York 10801

Dr. Aaron is Editor of The Medical Letter on Drugs and Therapeutics, a publication concerned with the discussion of various drugs or categories of drugs. His qualifications and experience are set forth in CX-689. He will authenticate CX-510, an issue of The Medical Letter dated July 5, 1974 which discusses the efficacy, comparative efficacy, and side effects of various non-prescription analgesics. Dr. Aaron (or possibly a substitute witness, Dr. Mark Abramowicz, Associate Editor) will discuss the manner in which CX-510 was written and approved by a body of experts highly qualified

in the area of efficacy and comparative efficacy of mild analgesics and he will demonstrate that such persons are representative of a broad sample of expert opinion in this field.

14. Sidney Riegelman, Ph.D.
Professor and Chairman
Department of Pharmacy
Room 1145 Health Sciences, East
University of California
San Francisco, California 94122

Dr. Riegelman is a leading expert in the bioavailability of analgesic products. His qualifications and experience are set forth in CX-690. Dr. Riegelman will testify concerning the bioavailability of aspirin in products such as Bufferin and will testify as to factors involved in bioavailability of these drugs such as disintegration, dissolution, and absorption. He will testify as to the relationship between blood levels of an analgesic and relief of pain, including the onset and degree of relief. He will also testify, on the basis of his opinion and the state of expert opinion in general, as to the efficacy and comparative efficacy of Bufferin and other non-prescription analgesics.

15. C. Richard Chapman, Ph.D.
Department of Anesthesiology
University of Washington
Seattle, Washington 98195
16. Frederick J. Evans, Ph.D.
111 N. 49th Street
Philadelphia, Pennsylvania 19139
17. Richard Sternbach, M.D.
Veterans Administration Hospital
3350 LaJolla Village Drive
San Diego, California 92161

Drs. Chapman, Evans and Sternbach are all experts in the analysis and measurement of pain (particularly artificially induced or "experimental" pain) and its relief. Their qualifications and experience are set forth in CX-691 (Dr. Chapman); CX-692 (Dr. Evans); and CX-693 (Dr. Sternbach).

Each will testify, on the basis of his knowledge and experience and the state of expert opinion in general, concerning pain (particularly experimental pain), its measurement, and its relief through analgesics. Each will also testify, on the basis of his knowledge and experience and the state of expert opinion in general, regarding the types and methodologies of experimental pain studies which are necessary for purposes of evaluating the efficacy and comparative efficacy of analgesic drugs, and each will discuss the criteria for such studies as would be necessary to support claims of comparative efficacy for such drug products. Each will analyze experimental pain studies conducted on Excedrin and Bufferin which purported to evaluate the comparative efficacy of those products to aspirin and/or placebo, and will give his expert opinion concern-

ing the validity of the methodology and the conclusions of such studies.

18. Byron Wm. Brown, Jr., Ph.D.
All6
Stanford University Medical Center
Stanford, California 94305
19. Mr. Stanley L. Wallenstein
Sloan-Kettering Institute for
Cancer Research,
410 E. 68th Street,
New York, New York 10021

Dr. Brown and Mr. Wallenstein are experts in the statistical analysis of data collected in clinical studies, including clinical studies on analgesics. Their qualifications are set forth in CX-694 (Dr. Brown); and CX-695 (Mr. Wallenstein).

Each will testify concerning his statistical analysis of clinical studies on Excedrin and Excedrin P.M. (both published and unpublished), which evaluated the comparative efficacy of those products, aspirin and/or placebo. Each will testify, on the basis of his knowledge and experience and the state of expert opinion in general, regarding the validity of the statistical methods and statistical conclusions of such studies. Each will also testify, on the basis of his knowledge and experience and the state of expert opinion in general, concerning the types of statistical analyses which must be undertaken on clinical studies designed

to evaluate the efficacy of analgesic drugs, and the types of statistical analyses and conclusions that would be necessary to support claims of comparative efficacy for such drug products.

20. Gene H. Smith, Ph.D.
Erich Lindemann Mental Health Center
Government Center
Boston, Massachusetts

Dr. Smith is an expert in the field of clinical testing of analgesic drugs and the study of artificially-induced pain. His qualifications and experience are set forth in CX- 696. He will testify, on the basis of his knowledge and experience, regarding the need for clinical studies to evaluate the efficacy and comparative efficacy of analgesic drugs, and will discuss the criteria for such clinical studies as would be necessary to support claims of comparative efficacy for such drug products. He will state his opinion regarding the comparative efficacy of Excedrin and other non-prescription analgesic products. He will analyze a clinical study directed by him which evaluated the comparative efficacy of Excedrin, aspirin and placebo on 785 post-partum patients, and he will also testify concerning the validity of the design, methodology and conclusions of such study.

21. J. Alfred Rider, M.D.
350 Parnassus Avenue,
Suite 900
San Francisco, California 94117

Dr. Rider is a physician and a specialist in internal medicine and gastroenterology whose qualifications and experience are set forth in CX-697. He will testify, on the basis of his knowledge and experience, as to the side effects and comparative side effects of Bufferin and other non-prescription analgesics. He will also analyze a number of studies which compared the side effects of Bufferin and other non-prescription drugs, and will testify concerning the validity of the design, methodology and conclusions of such studies.

22. William D. Paul, M.D.
University Hospital
Iowa City, Iowa

Dr. Paul is a physician who for a number of years has conducted studies sponsored by Bristol-Myers Co. He will discuss a number of studies conducted under his direction (and documents related thereto), which studies compared the blood levels of Bufferin to those of aspirin. He will also testify concerning the design, methodology and conclusions of such studies.

23. Naomi de Sola Pool, M.D.
Research Testing Labs Inc.
44-07 Little Neck Parkway
Little Neck, New York

Dr. de Sola Pool (or possibly a substitute witness) will discuss the design, methodology and findings of CX-517, a study conducted by Research Testing Laboratories Inc. for Bristol-Myers Co.

24. Harold Sherman, D.D.S.
35 Park Avenue
New York, New York

Dr. Sherman and others conducted the study referenced in CX-451 and CX-452. He (or a substitute witness) will discuss the design, methodology and findings of that study.

25. Herbert W. Copelan, M.D.
807 Spruce Street
Philadelphia, Pennsylvania 19100

Dr. Copelan (or possibly a substitute witness), will discuss CX-507, a study conducted by Ivy Laboratories, Inc. (Dr. Copelan's former employer), which was sponsored by Bristol-Myers Co. Dr. Copelan (or his substitute) will also discuss the design, methodology and findings of the study.

26. James Parkhouse, M.D.
Nuffield Department of Anesthesia
The Radcliffe Infirmary
Oxford, England

Dr. Parkhouse (or possibly a substitute witness) will discuss the findings contained in CX-501, and will discuss the design and methodology utilized in the study reported in that exhibit.

27. Employee(s) or Former Employee(s)
Stanford Research Institute
Menlo Park, California

This person or persons will discuss CX-549 and CX-550, and will testify as to the design, methodology and findings of the studies designated as CX-549 and CX-550.

28. Employees or Former Employees
Bristol-Myers Company

Various employees or former employees of Bristol-Myers Company will discuss a number of documents submitted by respondents to complaint counsel in response to various subpoenas and Section 6(b) Orders. Such employees include the following: F.W. Mueller; A.H. Rodgers; H. Glaser; E. Rose; W.C. Frey; K. Melman; W.B. Elvers; and V. Cotty.

29). William L. Wilkie, Ph.D.
Department of Marketing
School of Business Administration
University of Florida
Gainesville, Florida

Dr. Wilkie is an associate Professor of marketing at the University of Florida. His qualifications and experience are set forth in CX-698. He will analyze several market research and consumer research studies (CX-305 - 348 and CX-356 - 357) obtained from respondents' files or from the files of American Home Products and Sterling Drug in the companion analgesic cases and a study of consumer images and beliefs about Bufferin, Excedrin, Anacin and other analgesic products commissioned by complaint counsel in 1975 (CX-349-

352). He will testify on the basis of these studies and his general expertise in marketing and consumer behavior as to consumers' recall of the challenged advertising claims over extended periods of time and as to consumers' images and beliefs concerning the efficacy and comparative efficacy of Bufferin, Excedrin and Excedrin P.M. He will testify as to the sources of those images and beliefs and as to their probable duration. Dr. Wilkie will testify on the basis of certain of these studies as to consumers' lack of knowledge of the presence of aspirin and caffeine as ingredients in Excedrin and aspirin as an ingredient in Bufferin and Excedrin P.M. He will also testify as to the appropriate form of corrective advertising to remedy the deception of consumers which will continue even if the challenged advertising has stopped.

301. Ivan Ross, Ph.D.
Marketing Department
College of Business Administration
University of Minnesota
Minneapolis, Minnesota 55455

Dr. Ross is an Associate Professor of Marketing in the College of Business Administration at the University of Minnesota. His qualifications and experience are set forth in CX-699. He will testify as to his expert opinion of the express and implied representations made by the challenged advertising for Bufferin, Excedrin and Excedrin P.M. He will also analyze the advertising recall studies conducted on several of the challenged advertisements (CX-245 through CX-304), and will testify as to how those studies indicate that consumers understand and interpret those advertisements. He will analyze several internal documents of the respondents and communications between respondents Bristol-Myers, Ted Bates, Young and Rubicam (CX- 551 et. seq.) and will testify as to how those documents demonstrate respondents' intent to make the challenged representations. In addition, Dr. Ross will analyze several market research and consumer research studies (CX-305-348 & CX-353-357) obtained from respondents' files or from the files of respondents American Home Products and Sterling Drug in the companion analgesic cases (Dockets 8918 and 8919, respectively) and a study of consumer images of and beliefs about Anacin, Bufferin and Excedrin commissioned by complaint counsel in 1975 (CX-349, - 352). He will testify on the basis of these studies as to consumers' recall of the challenged advertising claims for Bufferin, Excedrin and Excedrin P.M. over extended periods of time and as to

consumers' images or beliefs concerning the efficacy and comparative efficacy of Bufferin, Excedrin and Excedrin P.M. He will testify as to the sources of those images and beliefs and as to their probable duration. Dr. Ross will testify on the basis of certain of these studies as to consumers' lack of knowledge of the presence of aspirin and caffeine as ingredients in Bufferin and Excedrin P.M. Dr. Ross will also evaluate the Gosselin (National Prescription Audit) and National Disease and Therapeutic Index Reports (CX-364 through CX-390), and he will testify as to whether these are competent and reliable evidence that would form a reasonable basis that doctors recommend Bufferin more than other non-prescription internal analgesic products. He will also testify as to the appropriate form of corrective advertising to remedy the deception of consumers which will continue even if the challenged advertising has stopped.

31). Joel Cohen, Ph.D.
Chairman, Department of Marketing
School of Business Administration
University of Florida
Gainesville, Florida

Dr. Cohen is Chairman of the Department of Marketing at the University of Florida and was formerly with National Analysts, Inc., a market research firm in Philadelphia, Pa. His qualifications and experience are set forth in CX-700. He will analyze several market research and consumer research studies (CX-305-348 & CX-353-357) obtained from respondents' files

of from the files of American Home Products and Sterling Drug in the companion analgesics cases and a study of consumer images and beliefs about Anacin, Bufferin and Excedrin, commissioned by complaint counsel in 1975 (CX-349-352). He will testify on the basis of these studies and his general expertise in marketing and consumer behavior as to consumers' recall of the challenged advertising claims for Bufferin, Excedrin and Excedrin P.M. over extended periods of time and as to consumers' images and beliefs concerning the efficacy and comparative efficacy of Bufferin, Excedrin and Excedrin P.M. He will testify as to the sources of those images and beliefs and as to their probable duration. Dr. Cohen will testify on the basis of certain of these studies as to consumers' lack of knowledge of the presence of aspirin and caffeine as ingredients in Excedrin and aspirin as an ingredient in Bufferin and Excedrin P.M. He will also testify as to the appropriate form of corrective advertising to remedy the deception of consumers which will continue even if the challenged advertising has stopped.

32). Clark Leavitt, Ph.D.
Faculty of Marketing
College of Administrative Science
The Ohio State University
1775 South College Road
Columbus, Ohio 43210

Dr. Leavitt is a Professor of Marketing at Ohio State University. He is a former Director of Communication Laboratory for Leo Burnett Company, a major advertising agency located in

Chicago. His qualifications and experience are set forth in CX-701. He will testify as to the questionnaire and survey design of a study commissioned by complaint counsel in 1975 and conducted by the Gallup Organization, Inc. (CX- 349 to 352). Dr. Leavitt will also testify as to his analysis of the results of the study as to consumer images of and beliefs about the efficacy and comparative efficacy of Bufferin and Excedrin as demonstrated by this study.

33). Irving Crespi, Ph.D.
Executive Vice President
The Gallup Organization, Inc.
53 Bank Street
Princeton, New Jersey 08540

Dr. Crespi is Executive Vice President of the Gallup Organization, Inc., a nationally known survey research firm. His qualifications and experience are set forth in CX-702 . He will testify as to the methodology employed by his firm in conducting the field work in the study of consumers' images of and beliefs about the efficacy and comparative efficacy of Bufferin, Excedrin and other analgesic products commissioned by complaint counsel in 1975 (CX-349 to 352). His testimony will include, but not necessarily be limited to, a discussion of the sample, the projectability of the study, the statistical confidence levels of the findings, the method of selecting and training the interviewers, the method of conducting the interviews, coding of responses, and the method of producing the data.

34) . Michael L. Ray, Ph. D.
Graduate School of Business
Stanford University
Palo Alto, California 94305

Dr. Ray is a Professor in the Graduate School of Business Administration at Stanford University. His qualifications and experience are set forth in CX-703 . He will testify as to his expert opinion of the express and implied representations made by the challenged advertising for Bufferin, Excedrin and Excedrin P.M. He will also analyze advertising recall studies conducted on several of the challenged advertisements (CX-245 through CX-304) and will testify as to how those studies indicate that consumers understand and interpret those advertisements. He will analyze internal documents of the respondents and communications between respondents Bristol-Myers, Ted Bates and Young & Rubicam (CX- 551 et. seq.) and will testify as to how those documents demonstrate respondents' intent to make the challenged representations. In addition, Dr. Ray will analyze several market research and consumer research studies (CX-305 to 348) obtained from respondents' files or from the files of respondents American Home Products and Sterling Drug in the companion analgesics cases (Docket 8918 and 8919, respectively) and a study of consumer images of and beliefs about Bufferin, Excedrin and other analgesic products commissioned by complaint counsel in 1975 (CX-349 to 352). He will testify on the basis of these studies as to consumers' recall of the challenged advertising claims for Bufferin, Excedrin and Excedrin P.M. over extended periods of time and as to consumers'

images or beliefs concerning the efficacy and comparative efficacy of Bufferin, Excedrin and Excedrin P.M. He will testify as to the sources of those images and beliefs and as to their probable duration. Dr. Ray will testify on the basis of certain of these studies as to consumers' lack of knowledge of the presence of aspirin as an ingredient in Bufferin and Excedrin P.M. Dr. Ray will also evaluate the Gosselin (National Prescription Audit) and National Disease and Therapeutic Index Reports (CX-364 through CX-390), and he will testify as to whether these are competent and reliable evidence that would form a reasonable basis that doctors recommend Bufferin more than any other non-prescription internal analgesic product.

35). Harry Davis, Ph. D.
Graduate School of Business
Administration
University of Chicago
Chicago, Illinois 60637

Dr. Davis is a Professor in the Graduate School of Business Administration at the University of Chicago. His qualifications and experience are set forth in CX 704 . Dr. Davis will analyze and interpret several internal documents of the respondents and communications between respondents Bristol-Myers, Ted Bates and Young & Rubicam (CX-551 et. seq.). Dr. Davis will testify as to how those documents demonstrate respondents' intentions to make the challenged representations. In addition, Dr. Davis will analyze several market and consumer research studies (CX-305 to 357) obtained from respondents' files or

from the files of American Home Products or Sterling Drug in the companion analgesic cases as well as a study of consumer images of and beliefs about Bufferin, Excedrin and other analgesic products commissioned by complaint counsel in 1975. Dr. Davis will testify on the basis of these studies as to consumers' recall of the challenged advertising claims for Bufferin, Excedrin and Excedrin P.M. over extended periods of time and as to consumers' images or beliefs concerning the efficacy and comparative efficacy of Bufferin, Excedrin and Excedrin P.M. He will testify as to the sources of those images and beliefs and as to their probable duration. Dr. Davis will also testify on the basis of certain of these studies as to consumers' lack of knowledge of the presence of aspirin and caffeine as ingredients in Excedrin and aspirin as an ingredient in Bufferin and Excedrin P.M.

36). Peter H. Rossi, Ph.D.
Department of Sociology
University of Massachusetts
Amherst, Massachusetts 01002

Dr. Rossi is a Professor of Sociology at the University of Massachusetts. His qualifications and experience are set forth in CX- 705. He will analyze several market research and consumer research studies (CX-305 through CX-348) obtained from respondents' files or from the files of respondents American Home Products and Sterling Drug in the companion analgesics cases and a study of consumer images of and beliefs about Bufferin, Excedrin and other analgesic products commissioned by complaint counsel in 1975 (CX-349 - 352).

He will testify on the basis of these studies as to consumers' images or beliefs concerning the efficacy and comparative efficacy of Bufferin, Excedrin and Excedrin P.M. He will testify as to the sources of those images and beliefs and as to their probable duration. He will also testify as to the appropriate form of corrective advertising to remedy the deception of consumers which will continue even if the challenged advertising has stopped.

37). Frank M. Bass, Ph. D.
Ford Foundation Visiting
Professor of Marketing
Graduate School of Business
University of Chicago
5836 Greenwood Avenue
Chicago, Illinois 60637

Dr. Bass is a visiting professor of marketing at the University of Chicago for the academic year 1975-1976. His permanent position is Loeb Distinguished Professor of Management, Krannert Graduate School of Industrial Administration, Purdue University, West Lafayette, Indiana. His qualifications and experience are set forth in CX-706. He will analyze several market research and consumer research studies (CX-305 to 348) obtained from respondents' files or from the files of respondents American Home Products and Sterling Drug in the companion analgesics cases and a study of consumer images and beliefs about Bufferin, Excedrin and other analgesic products commissioned by complaint counsel in 1975 (CX-349 - 352). He will testify on the basis of these studies, his review of additional information about the market for over-the-counter analgesics, and his general expertise as to consumers' images

and beliefs concerning the efficacy and comparative efficacy of Bufferin, Excedrin and Excedrin P.M. He will testify as to the sources of those images and beliefs and as to their probable duration. In addition, Dr. Bass will testify as to the appropriate form of corrective advertising to remedy the deception of consumers which will continue even if the challenged advertising has stopped.

38). Mr. Gerald Lukeman, President
ASI Market Research, Inc.
1370 Avenue of the Americas
New York, New York 10019

Mr. Lukeman has been President of ASI Market Research, Inc. for 11 years. He will testify as to the authenticity of several ASI Audience Reaction Tests (CX-245 through 265) conducted on Bufferin, Excedrin and Excedrin P.M. advertisements. He will explain the methodology for conducting the studies and the method of reporting the results. He will explain the significance of the various types of evaluation conducted on each advertisement and the way in which those evaluations are determined.

39). Mr. Cy Chaikin, President
Chaikin Research Associates
211 East 43rd Street
New York, New York

Mr. Chaikin is currently President of Chaikin Research Associates. He was formerly a principal in Sobel-Chaikin Research Associates and was with that organization when the study entitled "Headache Remedy/Pain Reliever Product Usage and Advertising Penetration" (CX- 345) was conducted. He had responsibility for that study and will authenticate the report and testify as to the design of the study and the methodology by which it was carried out. He will also testify with respect to the method of reporting the data and the analysis thereof.

40). Mr. Arnold Fishman, President
Lieberman Research-West, Inc.
1801 Century Plaza West
Los Angeles, California 90067

Mr. Fishman is currently the President of Lieberman Research-West, Inc. He represented Lieberman Research Inc. in the design

and execution of this study and the method of producing the data tabulations which are CX-348 .

41). Mr. Joseph Pernica, President
Consumer Behavior, Inc.
345 East 69th Street
New York, New York 10021

Mr. Pernica is currently the President of Consumer Behavior Inc. From June, 1968 to December 1970 he was employed as Vice-President and Associate Research Director for Benton & Bowles and was the person at Benton & Bowles who was responsible for the research study conducted by Lieberman Research, Inc. (CX- 348) and the advertising research report based on that data entitled "A Study of Vanquish's Market Opportunities" (CX- 347), produced by Benton & Bowles. He will testify as to his participation in the design of the study, the methodology employed in carrying out the data collection, and the method of presenting the data, both in the data tabulations (CX- 348), and the report (CX-347). He will testify as to his analysis of the data and will authenticate CX- 347 .

42). Mr. Frederick Elkind
Account Research Director
Benton & Bowles
909 Third Avenue
New York, New York 10022

Mr. Elkind participated with Mr. Pernica at Benton & Bowles in the design, execution and analysis of the study conducted by Lieberman Research Inc. and Benton & Bowles (CX-347 - 348). He will testify as to his participation in all phases of this study.

43). Lloyd C. Miller
Vice-President, Director
of Market Research
Dancer-Fitzgerald-Sample, Inc.
347 Madison Avenue
New York, New York 10017

We are advised that Mr. Miller supervised the design, execution and analysis of the study entitled "Assets and Liabilities Study of Adult Analgesics" (CX- 346), conducted in 1967 by Dancer-Fitzgerald-Sample, Inc. He will testify as to the design of this study, the methodology by which it was conducted, and the method of presenting the data and the analysis thereof.

44). Mr. Martin Weinberger
Vice-President-Research Director
Oxtoby-Smith, Inc.
150 East 58th Street
New York, New York

Mr. Weinberger was involved in conducting the studies entitled "A Study In-Depth of Heavy Users of Analgesics for Headache Relief (August, 1967) (CX-343) and "A Follow-Up Study of Attitudes Toward Headaches and Analgesics Among Heavy Users of Leading Brands (October, 1970)". (CX-344). He participated in writing the questionnaires, analyzed the results and wrote the reports. He will authenticate the report of each study and will testify as to all aspects of the methodology of conducting each study.

The following are designations of generic categories of witnesses who will be called to authenticate and explain various documents. The names and addresses of the appropriate persons are in the process of being obtained and we will advise all parties of their identity as soon as it is obtained.

- 45). Employee(s) or Former Employee(s)
Young & Rubicam, Inc.
New York, New York

These persons will testify as to the design, execution and analysis of the copy tests and marketing studies designated CX-276-294; CX-306; 308; 310-312; 316; 318; 320 to 322; 327; 328; 330; 334; 336-341; 353-354; and 356.

- 46). Employee(s) or Former Employee(s)
Ted Bates & Company, Inc.
New York, New York

These persons will testify as to the design, execution and analysis of the copy tests and marketing studies designated CX-266-275; 305; 307; 326; 332; 608; and 648.

- 47). Employee(s) or Former Employee(s)
The Gallup Organization, Inc.
53 Banks Street
Princeton, New Jersey 08540

This person or persons will testify as to the design, execution and analysis of the marketing studies designated CX-333 and 335.

- 48). Employee(s) or Former Employee(s)
Edward Blank, Inc.

This person or persons will testify as to the design, execution and analysis of the marketing studies designated CX- 314 and 315.

- 49). S.E. Kravetz (or other appropriate person)
Maxwell House Division
General Foods Division
General Foods Corporation

This person or persons will testify as to the design, execution and analysis of the study designated CX-355.

- 50). President (or other appropriate official(s))
The A.C. Nielsen Company
Chicago, Illinois

This person or persons will testify as to the design, execution and analysis of the Nielsen reports designated CX-358-363.

- 51). President (or other appropriate official(s))
R.A. Gosselin & Company, Inc.
Dedham, Massachusetts

This person or persons will testify as to the design, execution and analysis of the Gosselin National Prescription Audit
ten year semi-annual and monthly reports designated
CX- 367 through CX-380.

- 52). President (or other appropriate official(s))
H.D. Ostberg Associates, Inc.
300 Park Avenue South
New York, New York 10010

This person or persons will testify as to the design, execution and analysis of the copy tests and marketing studies
designated CX-302-304.

- 53). Employee(s) or Former Employee(s)
H.J. Mead Research Co.
New York, New York

These persons will testify as to the design, execution and analysis of the marketing studies designated CX-305 and 331.

- 54). - Employee(s) or Former Employee(s)
Fourienzos Organization
New York, New York

These persons will testify as to the design, execution and analysis of the marketing study designated CX-307.

- 55). Employee(s) or Former Employee(s)
Market Science Associates
777 Third Avenue
New York, New York

These persons will testify as to the design, execution and analysis of the marketing study designated CX-315.

- 56). Employee(s) or Former Employee(s)
National Family Opinion, Inc.
Toledo, Ohio

These persons will testify as to the design, execution and analysis of the marketing study designated CX-317.

- 57). Employee(s) or Former Employee(s)
Oxtoby-Smith, Inc.
150 East 58th Street
New York, New York

These persons will testify as to the design, execution and analysis of the studies designated CX 323 and CX-357.

- 58). Employee(s) or Former Employee(s)
Trendex, Inc.
15 Riverside Avenue
Westport, Connecticut 06880

These persons will testify as to the design, execution and analysis of the study designated CX-324.

- 59). Employee(s) or Former Employee(s).
Grey Advertising, Inc.
Marketing & Research Department
773 Third Avenue
New York, New York 10017

These persons will testify as to the design, execution and analysis of the marketing study and copy tests designated CX-325.

- 60). Employee(s) or Former Employee(s)
Daniel Yankelovich, Inc.
Philadelphia, Pennsylvania

These persons will testify as to the design, execution and analysis of the study designated CX-329.

- 61). Employee(s) or Former Employee(s)
deKadt Marketing and Research, Inc.
12 Havemeyer Place
Greenwich, Connecticut 06830

These persons will testify as to the design, execution and analysis of the study designated CX-342.

- 62). Employee(s) or Former Employee(s)
Schwerin Research Corporation
270 Madison Avenue
New York, New York 10016

These persons will testify as to the design, execution and analysis of the copy test designated CX-298.

- 63). Employee(s) or Former Employee(s)
Suburban Associates Market Research
210 South Broad Street
Ridgewood, New Jersey 07450

These persons will testify as to the design, execution and analysis of the copy tests designated CX-299 to CX-361.

64). Employee(s) or Former Employee(s)
 Lea, Incorporated
 Ambler, Pennsylvania 19002

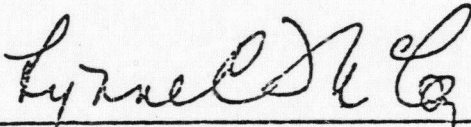
These persons will testify as to the designs, execution
and analysis of the studies designated CX-381 through CX-390.

65). Employee(s) or Former Employee(s)
 Bristol-Myers
 345 Park Avenue
 New York, New York

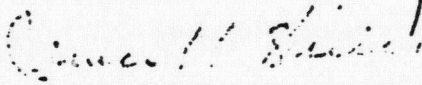
These persons will testify as to the design, execution and
analysis of the study designated CX-319.

As noted on our document list, complaint counsel intend to introduce the report of the Food and Drug Administration's OTC Panel on Internal Analgesics if that report is issued prior to the commencement of hearings in this case. If that is the case, we will call as a witness the appropriate expert or experts who were involved in the Panel's deliberations and evaluations to testify as to its conclusions on issues relevant to this case.

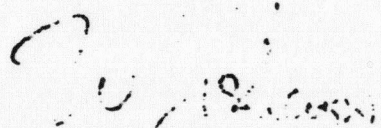
Respectfully submitted,



Lynne McCoy



James H. Skiles



W. Benjamin Fisherow

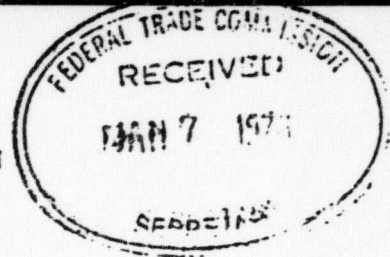
Dated: December 31, 1975

Exhibit XIV

-347a-

Exhibit XIV

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
BRISTOL-MYERS COMPANY,
a corporation, and
TED STATES & COMPANY, INC.,
a corporation, and
YOUNG & RUBICAM, INC.,
a corporation.

DOCKET NO. 8917

TO: The Honorable Montgomery K. Hyun
Administrative Law Judge

COMPLAINT COUNSEL'S TRIAL BRIEF

I. INTRODUCTION

Complaint counsel will show by a preponderance of documentary and testimonial evidence that the respondents have, over a number of years, created and disseminated massive advertising campaigns for Bufferin, Excedrin and Excedrin P.M., which contain as their central themes deceptive and unfair representations and practices in violation of the Federal Trade Commission Act. Five major categories of advertising deception and unfairness will be considered, as follows:

- (1) representations of therapeutic superiority over competing products, when a substantial medical question exists as to whether there are any significant differences and when the existence of such question is not disclosed;

- (2) claims that the representations of therapeutic superiority over competing products have been established, when such is not the case;
- (3) the promotion of the three products as mood drugs to relieve nervous tension and enable people to cope with everyday problems when there is no competent and reliable scientific evidence to support such representations;
- (4) references to scientific studies as support for claims of therapeutic superiority, when a substantial medical question exists as to the validity of such studies and when the existence of such question is not disclosed;
- (5) representations of medical endorsement and recommendation, when there is no competent and reliable evidence to support such claims; and
- (6) failure to disclose the material fact of the presence of aspirin and caffeine.

Furthermore, the unfair representation that Excedrin P.M. is an effective mild sedative, when the respondents possessed no competent and reliable scientific evidence to support such a claim, and misrepresentations of the identity or ingredients, including aspirin and caffeine, will be challenged.

The record, which complaint counsel will make in this case will also clearly demonstrate that a broad cease and desist order is warranted. In addition, both documentary and testimonial evidence will show that false and material beliefs, concerning Bufferin's, Excedrin's, and Excedrin P.M.'s alleged therapeutic superiority and capabilities for relieving tension, now exist in the minds of substantial numbers of consumers and will continue to exist unless a strong corrective advertising order is issued.

II. THE RESPONDENTS AND THEIR ADVERTISING CAMPAIGNS

Through admissions by the respondents, internal documents from the respondents' files and marketing data, such as that compiled by the A.C. Nielsen Company, complaint counsel will demonstrate that the products Bufferin, Excedrin and Excedrin P.M. are part of a massive headache remedy market with total consumer sales of approximately \$422,500,000 as of December, 1973. Of this market, it will be shown that the three Bristol-Myers' products hold a substantial share. For example, Bufferin held a 13% share, and Excedrin and Excedrin P.M. had 8.5% and 1.8% respectively in December, 1973.

In addition, complaint counsel will show that these products have been promoted by overwhelming advertising expenditures in all media, which have resulted in consumers' being bombarded with advertisements everywhere they turn. For example, in 1973, Bufferin had an advertising to sales ratio of 24% and Excedrin and Excedrin P.M. had ratios of

29% and 33% respectively. Furthermore, advertisements for Bufferin have been disseminated for at least 25 years, since 1950, and Excedrin has been advertised at least since 1960. Throughout all these years, the central advertising themes for Bufferin and Excedrin (alleged therapeutic superiority and tension-relieving capabilities) have been the same as those being challenged in the present proceedings as deceptive and unfair.

III. THE CHALLENGED REPRESENTATIONS AND PRACTICES ARE DECEPTIVE AND UNFAIR

Through extensive documentary and testimonial evidence, complaint counsel will clearly demonstrate that advertisements for Bufferin, Excedrin and Excedrin P.M. have for many years used as their central and secondary advertising themes representations which are deceptive and unfair. In addition, it will be shown that they have engaged in other advertising practices which likewise are in violation of the Federal Trade Commission Act.

As a first step towards this proof, complaint counsel intend to introduce a large number of broadcast and print advertisements for Bufferin, Excedrin and Excedrin P.M. which have been chosen as representative, but by no means inclusive, of all advertisements for these products. They will cover approximately the whole period since each of the products was first advertised until the present time; however, most of the advertisements will concentrate on the period 1968 through 1973, which was the relevant time frame for discovery from the respondents.

In proving that the alleged representations are made in the advertisements, complaint counsel will rely on four avenues of proof. Firstly and most importantly, the Administrative Law Judge's expertise in interpreting the meaning of advertisements will be relied upon. Secondly, complaint counsel will introduce the expert testimony of several recognized experts in consumer psychology and behavior, including Drs. Ivan Ross and Michael Ray, who will testify how consumers are likely to react to the advertisements and what messages are conveyed.

In addition, complaint counsel will introduce the results on numerous copy tests, advertising penetration tests and marketing studies which the respondents either conducted themselves or had conducted by outside survey firms. Collectively, these reports, as well as their testimonial analysis by consumer psychology experts, such as Drs. Ray, Ross, and Harry Davis, will show that the respondents' advertising, either expressly or impliedly, makes the representations alleged in the complaint. More specifically, the copy tests, many of which contain actual verbatim responses of the consumers tested, will show what messages consumers perceive in specific advertisements and the strength of that perception. The penetration and marketing studies likewise recount the communication of messages and the strength of recall of those messages, but do so in response to questions about the advertising for the products in general, rather than specific

advertisements.*/

Fourthly, complaint counsel will show, through admissions by the respondents and internal documents taken from their files, that the respondents have had a consistent and persistent strategy of portraying Bufferin, Excedrin and Excedrin P.M. as being therapeutically superior to aspirin and/or other analgesics and as being capable of relieving tension and enabling persons to cope with life's problems. Furthermore, the respondents were on notice from the results of the numerous consumer surveys conducted on their advertising that significant numbers of consumers perceived the alleged representations. Yet despite this information, they continued to disseminate the same advertisements and to develop new ones which contain identical representations and practices. This is additional proof that the respondents intended to convey the alleged representations and, as such, would be probative evidence that the alleged representations were, in fact, made.

Following is a discussion of the specific representations and practices alleged and complaint counsel's approach for proving each to be deceptive and unfair.

*/ Complaint counsel recognize that it is not necessary to take this additional step, since complaint counsel's burden of proof is only to show a "tendency and capacity" of the challenged advertisements to deceive. Charles of the Ritz Dist. Co. v. FTC, 143 F.2d 676, 680 (2nd Cir. 1944). However, since it can be shown that certain of the advertisements have, in fact, misled significant numbers of consumers, this is relevant evidence which should be dispositive of the advertisements' tendency and capacity to deceive.

A. Bufferin's Comparative Superiority Claims

The Complaint alleges that Bufferin advertisements make the representations either that Bufferin relieves pain faster than aspirin or that it relieves pain twice as fast as aspirin. (¶2A1,2; Issues 2(a), (b)) */ The respondents have admitted making the first representation (a general speed claim; however, they deny the second.

Both Bufferin's speed claims are based on the express representations contained in their advertisements that the product is absorbed into the blood stream faster than unbuffered aspirin. See e.g. Cx-77. Moreover, in some of the advertisements, e.g. Cx-1, a specific measure of Bufferin's advantage is stated: "twice as fast" or "in half the time" as plain aspirin. By portraying Bufferin as getting into the blood stream faster or twice as fast, the respondents have implied that Bufferin will thereby relieve pain faster or twice as fast. This is especially so since consumers, as laymen, are unaware of any differences between absorption and therapeutic effect and that such differences might be significant.

Complaint counsel will demonstrate that both these representations are deceptive and unfair in that there is a substantial medical question, recognized by experts in the field, whether Bufferin will relieve pain any more quickly than unbuffered aspirin. (¶10; Issue 5(a)) In ful-

*/ References are to paragraphs in the Complaint and to issues in the Contested Issues of Ultimate Fact. The same method of referencing will be used hereinafter.

filling its burden of proof of showing the existence of a substantial question, complaint counsel will rely on the expert testimony of leading physicians and pharmacologists who have been qualified by training and experience to evaluate the efficacy of analgesics, such as Drs. Houde, Garrett, Riegelman, Leonards, Moertel, C. Brown, Forrest and Azarnoff. Their testimony will be based on their training, their experience and the relevant medical literature. In addition, authoritative treatises and reports, such as the American Medical Association's Drug Evaluations, CX-512 and 513, the NAS/NRC report on non-prescription analgesics for the United States Food and Drug Administration, CX-511, and The Medical Letter, CX-510, will be relied upon.

The above testimonial and documentary evidence will show that, while theoretical arguments can be made that Bufferin's increased rate of absorption as shown in some tests may result in quicker onset of pain relief, there is reason to believe, from the complex nature of pain and its relief, that the blood levels of aspirin-order mild analgesics do not necessarily reflect speed of therapeutic relief, and that absent controlled clinical studies showing a superiority in speed of pain relief, a substantial medical question exists. In addition, it will be demonstrated that no clinical studies measuring speed of relief have been conducted on Bufferin, and that the few clinical studies in existence on other buffered aspirins have failed to demonstrate any significant therapeutic

difference in speed between the test product and unbuffered aspirin.

In addition, with respect to the "twice as fast" claim, complaint counsel will further demonstrate that there is a substantial question whether Bufferin is absorbed into the blood stream twice as fast as plain aspirin, as opposed to some lesser degree of speed. To this end, complaint counsel will rely, for example, on the results of tests contained in Bristol-Myers' own files, which show that in many of the blood level tests conducted by or for Bristol-Myers, Bufferin failed to be absorbed twice as fast as unbuffered aspirin. In addition, the expert witnesses listed above will testify that some of the tests supporting the "twice as fast" claim used measurements which are not considered to be the most valid ones by the scientific community.

It is alleged that some of the Bufferin advertisements also represent that Bufferin not only relieves pain twice as fast as plain aspirin, but that it also relieves twice as much pain. (¶9A3; Issue 2(c)). This representation is based on express advertising statements, such as "in the first critical minutes, Bufferin delivers twice as much pain reliever as simple aspirin." See e.g. CX-62. As with Bufferin's twice as fast speed claim, consumers will perceive in the above, and like statements, that the product relieves twice as much pain as unbuffered aspirin.

Complaint counsel will rely on the testimony of the expert witnesses and authoritative treatises and reports mentioned above to prove that a substantial question exists concerning Bufferin's purported greater therapeutic effect. The evidence will show that there is reason to believe that the blood levels of aspirin-order mild analgesics do not necessarily reflect therapeutic benefits and that absent controlled clinical studies showing such effects, a question exists. In addition, complaint counsel will demonstrate that no such studies have been conducted on Bufferin and that the few studies comparing plain aspirin with buffered aspirins other than Bufferin failed to show any differences in degree of pain relief.

The third major claim contained in Bufferin advertising throughout the years is a representation of absolute or comparative gentleness to the stomach. Essentially two gentleness claims have been made, (1) that Bufferin will not upset a person's stomach, e.g. CX-46 and 62, and (2) that Bufferin will upset a person's stomach less frequently than plain aspirin. See e.g. 55 and 77. (19A4, 5; Issues 2(d), (e)). The respondents have admitted making the second representation, but contest the first. However, the absolute prevention claim is expressly made, such as in CX-46, which states that Bufferin will provide "relief without the stomach upset plain aspirin can cause."

In showing the existence of a substantial question concerning the validity of these two representations, (§10; Issue 5(a)) complaint counsel will again rely on the testimony of the expert witnesses, the relevant medical literature and the authoritative treatises and reports mentioned above. All will show that Bufferin's purported superiority over unbuffered aspirin, in terms of gentleness to the stomach, has not been generally recognized among experts and has not been demonstrated by reliable, controlled clinical studies. In light of the subjective nature of pain and the lack of knowledge concerning the causes of gastric upset, such studies would be necessary to resolve the substantial medical question that exists. In fact, it will be shown that the only reliable published clinical studies on the subject showed no significant difference between Bufferin and unbuffered aspirin in terms of causing upset stomachs. Furthermore, it will be pointed out that at the time the advertisements were run Bristol-Myers had unpublished studies in its own files that showed no side effect superiority for Bufferin, yet in the face of such evidence respondents continued to make the gentler claims.

B. Excedrin's Comparative Superiority Claims

All Excedrin's advertising since its inception has stressed strength and has represented that Excedrin is a stronger, more effective pain reliever than aspirin or other non-prescription analgesics. Through use, either separately or in combination, of the term "extra strength pain reliever," see e.g. CX-125, 148 and 145, the emphasis on four ingredients rather than the one or two

contained in competitive products, including those advertised as "extra strength", see e.g. CX-148, or the references to one or two scientific studies in which Excedrin was said to have been a stronger pain reliever than aspirin, see e.g. CX-159, complaint counsel will show that the advertisements have portrayed Excedrin as relieving more pain than, or twice as much pain as, other analgesics including aspirin and as being a more effective pain reliever. (19B1, 2, 6, 7; Issues 2(f), (g), (k), (l)).

The respondents have admitted representing that Excedrin is a more effective pain reliever than aspirin, but they deny that they have made the comparison against other non-prescription analgesics. Complaint counsel will show, however, that comparisons have been made against other non-prescription analgesics, as in CX-148 where Excedrin is represented as being more effective than other products which contain fewer ingredients. In addition, the respondents deny making the other alleged representations described above, but a review of the advertisements, such as CX-159, shows that the claims of relieving more pain than, or twice as much pain as, other analgesics including aspirin are expressly made.

In addition some of Excedrin advertisements have also expressly represented that Excedrin relieves pain faster, see e.g. CX-145, and for a longer period of time than other products, see e.g. CX-125, and that it reduces fever more effectively than aspirin, see e.g. CX-162. (19A3, 4, 5; Issues 2(h), (i), (j)) The respondents have denied making these representations.

Through the use of expert testimony, authoritative reports, such as the AMA Drug Evaluations and The Medical Letter, and studies taken from Bristol-Myers' own files, complaint counsel will demonstrate that there exists a substantial medical question whether Excedrin is any more effective than other non-prescription analgesics, including aspirin, either in its strength, speed or duration of relief. (¶10; Issue 5(a)) More specifically, complaint counsel's expert witnesses, such as Drs. Moerzel, Houde, C. Brown, Azarnoff and Forrest, will testify that, based on their knowledge, experience, the relevant medical literature concerning Excedrin and the ingredients it contains and studies done specifically on Excedrin, there is no reason to believe that Excedrin is in any way superior to aspirin or other products, even though it is a combination of four ingredients. In fact, they will point out that several studies, including the only published study on Excedrin, failed to show any clinically significant difference between Excedrin and aspirin. In addition complaint counsel's experts will testify that because of the subjective and complex nature of pain relief and the nature of the ingredients contained in Excedrin, valid and reliable controlled clinical studies would be needed to resolve the existing substantial question concerning Excedrin's alleged superiority.

In addition, experts such as Drs. Houde, Wallenstein, C. Brown, B. Brown, Moertel, Chapman, Sternbach and Evans will testify that the two unpublished studies specifically cited in Excedrin's advertising, the Emich study, CX-425-432, and the Sherman study, CX-439-442, have major and basic flaws which preclude placing any reliance on the tests in determining the comparative efficacy of Excedrin. It will further be pointed out that at the same time the respondents based their advertising claims on the Emich and Sherman studies, there were other, unpublished studies in Bristol-Myers' files which showed no comparative superiority for Excedrin.

One of these latter studies was conducted by Dr. Gene Smith for Bristol-Myers. Dr. Smith will testify concerning the design and methodology and will describe the results, which show no clinically significant difference between equivalent numbers of Excedrin and aspirin tablets. */

C. Excedrin PM's Comparative Superiority Claims

Excedrin PM's advertising has, from its inception, represented that the product is more effective for the relief of nighttime pain than other products. In addition, certain advertisements have also conveyed the message that Excedrin PM

*/ No results or any other relevant information concerning this study were ever submitted to complaint counsel under any of the pre-trial discovery requests, although it clearly falls within the specifications of at least one of the subpoenae duces tecu addressed to Bristol-Myers. Complaint counsel were forced to subpoena the results of the study directly from Dr. Smith.

will relieve more pain than aspirin and that it is more effective because it contains three analgesic ingredients. (§9B8, 9, 10; Issues 2(m), (n), (o)) These representations are conveyed through such means as the use of the phrase "extra strength for relief from nighttime pain" (CX-233) and the emphasis on the number and combination of ingredients. In addition, the discussion of the "special ingredient" added to aid sleep further conveys the representation that the product is going to be more effective than aspirin or other analgesics which lack this ingredient for nighttime pain relief. See e.g. CX-213, 228, and 233.

Complaint counsel will demonstrate, however, that there exists a substantial medical question concerning the accuracy of these superiority claims. (§10; Issue 5(a)) First, most of the evidence discussed above concerning Excedrin is equally applicable to Excedrin PM, since they have essentially the same ingredients, with minor differences. Secondly, through the expert testimony of complaint counsel's witnesses, Drs. Houde, C. Brown, Moertel, Azarnoff and Forrest and such reports as the AMA Drug Evaluations and The Medical Letter, it will be shown that there is a substantial medical question concerning Excedrin PM's alleged superiority, both in overall therapeutic strength and ability to relieve nighttime pain. The witnesses will testify that, as with all therapeutic claims for this category of mild aspirin-order analgesics, controlled clinical studies are necessary to show superiority and that absent such studies,

the question is unresolved. Furthermore, it will be shown that there are no clinical studies in existence comparing the pain reliever abilities of Excedrin PM versus aspirin or other mild analgesics.

D. The "Established" Claims

In addition to making the affirmative superiority claims discussed above, advertisements for Bufferin, Excedrin and Excedrin PM also represent that the comparative therapeutic claims have been established. (¶7; Issue 3) Complaint counsel maintain that the making of any claim for the comparative efficacy of a drug is at least a representation that the validity of the claim is generally accepted by informed scientists or medical experts qualified to make such judgments and, is further a representation that there are scientific tests and studies or other forms of scientific evidence which establish the claim to be true.

This is particularly so with respect to advertising for Bufferin, Excedrin, and Excedrin PM, since the respondents have liberally filled such advertisements with indicia of medical acceptance and scientific proof. For example, Bufferin advertisements give the aura of medical approval when they state that doctors specify Bufferin more than other brands of pain reliever. See e.g. CX-46. Other Bufferin advertisements claim that tests published in medical journals show that Bufferin delivers twice as much pain reliever as plain aspirin. See e.g. CX-62. Still others use absolute numbers and percentages, such

as twice as fast or half the time, and visual graphs. See e.g. CX-1, 77 and 93. The consumer would not expect such finite numbers or graphs to be anything but the results of scientific tests or other medical knowledge. Another example is Excedrin advertising's references to either one or two studies showing that Excedrin was found to be more effective than aspirin for the relief of pain. See e.g. CX-159.

Contrary to the representations discussed above, complaint counsel will demonstrate that such claims of therapeutic superiority have not been established, (¶8; Issue 4) First, complaint counsel's expert witnesses will testify that in order to establish a claim concerning the comparative efficacy of a drug, the proposition set forth in the claim must be generally recognized by medical experts in the field and in the scientific or medical literature or, lacking that, there must be a sufficient number of valid and well controlled clinical studies to satisfy experts that the claim has been proven. Furthermore, the witnesses will testify that none of the comparative superiority representations for Bufferin, Excedrin and Excedrin PM meet the above criteria and that, therefore, they have not been established. At best, it will be pointed out, there exists a substantial question concerning the validity of the claims.

More specifically, expert witnesses, such as Drs. Houde, C. Brown, Moertel, Forrest, Azarnoff, Riegelman, Garrett and Leonards, will testify that it is not generally recognized that

Bufferin is any faster, more effective, or causes less gastric upset than unbuffered aspirin, even though some tests have shown that it is absorbed more quickly into the blood stream, and that they are aware of no valid controlled clinical studies which have demonstrated those facts. In addition, Drs. Houde, Moertel, C. Brown, Forrest and Azarnoff will testify that it is not generally recognized that Excedrin or Excedrin PM are any stronger or more effective than aspirin or other non-prescription analgesics. Furthermore, they will testify that not only are there no valid clinical studies which have demonstrated any superiority for the two products, but that there are several competent and reliable clinical studies on Excedrin which have shown no significant difference between the brand and aspirin for the relief of pain.

E. References to Studies in Advertising

In some of Bufferin's and Excedrin's advertising, reference is made to the results of scientific studies as proving that Bufferin is twice as fast and twice as strong as aspirin in relieving pain and that Excedrin is more than twice as strong as and more effective than other products in relieving pain. See e.g. CX-62 and 159. (¶14; Issue 2(p), (q)) Complaint counsel will show, however, that there is a substantial question as to the validity, significance or interpretation of the tests as they relate to the alleged representations. (¶15; Issue 5(b))

Through expert testimony described in more detail above, complaint counsel will show that the blood level tests referred to in the Bufferin advertisements are insufficient to support the "twice as fast" claims since they use unreliable measures and since other tests conducted by or for Bristol-Myers showed different results. Furthermore, the experts will testify that the blood levels studies are, in and of themselves, not adequate to prove that Bufferin will in fact relieve pain any more quickly or effectively than unbuffered aspirin and that in the absence of controlled clinical studies showing such alleged superiority, a substantial question exists. Furthermore, in advertisements more recent to those specifically cited in the Complaint, Bristol-Myers and Ted Bates have referred to the results of blood level tests to support a claim of Bufferin's unspecified speed superiority in relieving pain over aspirin and other products, as opposed to a representation of being "twice as fast." See e.g. CX-93. Complaint counsel will also challenge the use of these studies in advertising since, as the above mentioned experts will testify, blood level studies are, in and of themselves, inadequate to support a claim of relieving pain more quickly than other products.

Concerning Excedrin's use of test results in its advertising, complaint counsel's expert witness will also testify that there are major and basic flaws in each of the two studies to which the advertisements refer, the Emich and Sherman studies,

so that they cannot be used as support for a claim of therapeutic superiority. In addition, it will be shown that at the same time Bristol-Myers and Young & Rubicam were utilizing the test results in Excedrin advertising, other clinical studies of which the respondents were aware found no clinically significant difference between Excedrin and aspirin. The existence of such contradictory data in and of itself is sufficient evidence to show the existence of a substantial question about the significance of the tests' results to the claims made in advertising.

F. Failure to Use the Existence of a Substantial Question

The complaint alleges, and it is uncontested, (Issue 9 of Relevant and Material Facts Which Are Uncontested), that respondents failed to affirmatively disclose in advertisements for Bufferin, Excedrin and Excedrin PM the existence of a substantial question as to the validity of the comparative claims and as to the validity, significance or interpretation of tests in proving Bufferin and Excedrin's therapeutic superiority over other products. (¶11, 16; Issue 6) Complaint counsel will rely on the Administrative Law Judge to make the factual findings, based on the weight of all the evidence, that the existence of a substantial question is a material fact which, if known to consumers, would be likely to affect their determination whether or not to purchase such products and that failure to disclose such question renders the advertisements deceptive.

G. Tension Relieving Claims

The complaint alleges that advertisements for Bufferin, Excedrin and Excedrin PM represent that the products are effective in relieving nervous tension, anxiety and irritability and will enable people to cope with the ordinary stresses of everyday life. (§12(A), (B); Issue 2(r), (s)) A review of many of the challenged advertisements clearly shows that all three products have been promoted as mood drugs.

For example, some of the Bufferin advertisements, such as CX-55, show stressful situations and people who are nervous and tense until the product is taken. Some Excedrin advertisements expressly say that the product will relieve tension, e.g. CX-125, while others show stressful situations which are relieved when the person takes Excedrin, e.g. CX-148. Some Excedrin PM advertisements discuss how the product will enable people to relax and get to sleep when they are "tense and achy," e.g. CX-213.

Complaint counsel will demonstrate that at the time the respondents made the above representations, they did not possess or rely upon a reasonable basis to support such claims. (§13; Issue 7) Based on the expert testimony of complaint counsel's witnesses, Drs. Rickels, Houde, C. Brown, Moertel, Forrest and Azarnoff, it will be shown that competent and reliable scientific evidence in the form of controlled clinical studies showing a tranquilizing effect

for the products or the ingredients therein would be needed to form a reasonable basis for the tension relief proposition. After having reviewed the materials which Bristol-Myers claims to have possessed and relied upon for the tension representations, the expert witnesses will further testify that the data do not form such a reasonable basis.

In addition, the witnesses will testify that they are aware of no clinical studies which have proven the proposition and that it is generally recognized in the medical community and in the medical literature that these three products, and the combinations of ingredients therein, are not effective in the relief of tension and stress. In fact, Dr. Rickels will discuss the conclusions of the Food and Drug Administration's Advisory Committee on daytime sedatives and sleep aids which, after a comprehensive review of the published literature and of materials furnished by Bristol-Myers and other manufacturers, concluded that no valid evidence exists to show that any of the ingredients in the products at issue in this case, singly or in combination, can relieve tension, anxiety or stress. See CX-513.

H. Failure to Disclose the Existence of Aspirin and Caffeine

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The Complaint alleges that the respondents failed to disclose in advertising that Bufferin, Excedrin and Excedrin PM contain aspirin and that Excedrin contains caffeine. In addition, it is alleged that these facts are important to a consumer's decision to purchase and, therefore, are material facts which should be disclosed in advertising. (§20. Issue 9)

A review of all the advertising for Bufferin, Excedrin and Excedrin PM will show that not only does it fail to disclose the inclusion of aspirin and caffeine, but it even goes to great lengths to obscure those facts by describing the active ingredients by other than their usual names. See e.g. CX-1 and 125. Furthermore, complaint counsel will demonstrate through marketing studies, e.g. CX-314, 333, 334 and 347, that substantial numbers of consumers do not know that the three products contain aspirin and caffeine. Also, some of complaint counsel's expert medical witnesses, particularly Drs. Grossman, Farr, Menguy and Stevenson, will testify from their clinical experience that patients do not realize that many combination analgesic products, including Bufferin, Excedrin and Excedrin PM, contain aspirin and caffeine.

Testimony will also be offered by complaint counsel's expert witnesses, primarily Drs. Grossman, Farr, Stevenson and Menguy, that disclosure of the presence of aspirin and

caffeine is vitally needed since they can cause potential side-effects and hazards. For example, the fact that the two compounds are present is relevant and sometimes critical information for persons who suffer from certain gastric problems, anemia, ulcers or asthma, as well as for those who are taking certain types of drugs for other conditions. Combining those drugs with the aspirin and caffeine present in Bristol-Myers' products may result in dangerous complications and side effects.

In addition to showing that knowledge of the presence of aspirin and caffeine is material from a health standpoint as described below, complaint counsel will also demonstrate that the information is important to consumers for other reasons. For example, marketing studies conducted for General Foods Corp., which manufactures several decaffeinated coffees, show that many consumers are concerned about ingesting caffeine for personal reasons. See CX-353 through 355. Furthermore, it is uncontested that aspirin and caffeine are well-known, commonplace substances, widely available in many products, (Issue 10, Relevant and Material Facts Which Are Uncontested). Hence knowledge of their presence will enable consumers to determine whether they want to purchase the same aspirin and caffeine in different or less expensive forms.

I. Bufferin's Medical Recommendation Claims

Some of Bufferin's advertisements represent that physicians recommend Bufferin more than other non-prescription analgesics. See e.g. CX-46 and 62. (§17, Issue 2(u)) Bristol-Myers has stated that as substantiation for the recommendation claim, it relied upon the results of two marketing subscription surveys, - the National Prescription Audit and the National Therapeutic Disease Index.

Through the testimony of witnesses, experienced in evaluating surveys, such as Drs. Ross and Davis, it will be shown that the two surveys do not adequately substantiate the recommendation claim and that they, therefore, do not form a reasonable basis for the representation. (§18; Issue 7) For example, it will be shown that, contrary to the representations, Bufferin was listed in the surveys as being prescribed less than all brands of unbuffered aspirin and even less than another brand of buffered aspirin. Furthermore, the two surveys measure prescriptions written by physicians; yet the representation conveyed by the advertisements is one of recommendation and endorsement. Hence, the number of written prescriptions cannot be used as a measure of recommendations, especially since Bufferin can be sold without a prescription and common sense could lead one to conclude that physicians make many recommendations about non-prescription products which are not written down.

J. The Excedrin PM Mild Sedative Claims

Since its inception, advertising for Excedrin PM has expressly positioned the product as an effective mild sedative. See e.g. 213, 228, 233. (§12; Issue 2(t)) Complaint counsel will demonstrate that at the time Bristol-Myers and Young & Rubicam made the challenged representation, they did not possess or rely upon a reasonable basis to support such a claim. (§13; Issue 7)

Through the expert testimony of complaint counsel's witnesses, notably Drs. Rickels, Houde, C. Brown, Moertel, Azarnoff and Forrest, it will be demonstrated that competent and reliable scientific evidence in the form of controlled clinical studies showing a sedative effect for Excedrin PM or the ingredients therein, aside from any analgesic effects afforded, would be needed to form a reasonable basis for the sedative proposition. After reviewing the materials which Bristol-Myers claims to have possessed and relied upon for the sedative representation, the witnesses will testify that the data do not form such a reasonable basis. In addition, complaint counsel will introduce the report of FDA's Sedatives Panel (CX 513), which found that the existing evidence is insufficient to conclude that either methapyrilene fumarate, an ingredient contained in Excedrin PM, or the product itself afford any sedative effect which is beyond the benefit of pain relief.

K. Misrepresentations of the Identities
and Exclusivity of Ingredients

In various advertisements for the three Bristol-Myers products involved in this proceeding, the identities or exclusivity of the common and non-special ingredients aspirin, caffeine and methapyrilene fumarate have been misrepresented. (¶21, 22, Issues 2(v)-(y)) For example, in Bufferin advertisements, the brand is always compared to "plain" or "simple" aspirin without any explanation that Bufferin is composed solely of aspirin and buffers. See e.g. CX-62 and 77. In other advertisements, the aspirin contained in Bufferin is described as "its pain reliever." See e.g. CX-1. Thus, many consumers will perceive that the pain relieving ingredient in Bufferin is other than aspirin.

Likewise in some Excedrin advertisements, the ingredients aspirin and caffeine are described not by their common, well-known names, but an air of mystery has been given to them by displaying their chemical formulation or by using terms which make the ingredients seem unusual, such as referring to certain attributes of the ingredients, like "giving long lasting relief" and "anti-depressant." See e.g. CX-125.

Contrary to the above representations, complaint counsel's expert witnesses will testify that the analgesic ingredient in Bufferin is aspirin. In addition, they will testify that the ingredient in Excedrin described as giving long lasting pain relief is aspirin and that the ingredient called an

anti-depressant is caffeine. (¶22; Issue 8)

In a different vein, the advertising for Excedrin PM expressly describes its sleep aid ingredient as being special and available only in that brand. See e.g. CX-213. (¶23; Issue 2(y)) However, it is uncontested that the substance referred to in Excedrin PM's advertising as a special sedative is methapyrilene fumarate, which is available in several other non-prescription products. (Issue 11, Relevant and Material Facts Which Are Uncontested). Therefore, it is not an exclusive ingredient with Excedrin PM.

IV. FACTUAL ISSUES PERTAINING TO THE ADVERTISING AGENCIES

Additional factual issues to be resolved are whether the advertising agencies Ted Bates and Young & Rubicam actively and knowingly participated in the alleged deception and unfairness and whether they knew, had reason to know, should have known or could have known that the advertisements for Bufferin, Excedrin and Excedrin PM are deceptive and unfair. (Issues 12-19) The agencies have admitted helping to create, prepare and disseminate the challenged advertising. (Issue 5(b), Relevant and Material Facts Which Are Uncontested). Furthermore, complaint counsel will show by admissions from the respondents and internal documents from their files that the agencies did have such knowledge.

For example, it will be shown that the agencies were aware of expert medical opinions and reports which held that Bufferin, Excedrin and Excedrin PM have no therapeutic superiority over other products. yet they continued to portray the brands as comparatively faster, safer, stronger and more effective. Additionally, it will be shown that the agencies made no attempt to obtain expert advice from outside Bristol- Myers, but rather relied exclusively on that company, even in the face of conflicting opinions which should have put them on notice that their advertising may be deceptive or unfair.

Another issue pertaining solely to the advertising agencies is whether they are in substantial competition in commerce with other agencies. (§28; Issue 20) Complaint counsel will rely on admissions from the respondents, internal documents from their files, and submissions to subpoenae duces tecum to demonstrate that the respondents are two of the largest advertising agencies in the country, with many different clients.

Moreover, it will be demonstrated that in order to obtain and keep clients, it is necessary for Ted Bates and Young & Rubicam to compete with other agencies. Additionally, it will be pointed out that the advertisements for Bufferin, Excedrin and Excedrin PM were disseminated in interstate commerce and that the products themselves are sold in commerce. (Issues 4, 5(a), Relevant and Material Facts Which Are Uncontested). Thus, the agencies' activities

concerning the advertising necessarily affect commerce.

V. A STRONG REMEDY IS REQUIRED

The case presented by complaint counsel will amply demonstrate the need for a broad cease and desist order of the nature set out in the notice order. In addition, it will be shown that the provisions of the notice order, or any other provisions which become justified on the basis on the record developed and which complaint counsel propose, are reasonably related to the violations found. Finally, complaint counsel will clearly demonstrate that a strong corrective advertising remedy is necessary to dispel false beliefs about Bufferin's, Excedrin's and Excedrin PM's purported therapeutic superiority and tension relieving ability, which beliefs consumers will continue to hold for many years unless corrected by affirmative disclosures.

Complaint counsel will rely on a number of lines of proof to establish the need for corrective advertising. In the first instance, common sense would lead one to conclude that the sheer volume and lengthy duration of advertising which has emphasized Bufferin's, Excedrin's, and Excedrin PM's abilities to relieve tension and their therapeutic superiority over competing products would cause substantial numbers of consumers to hold erroneous beliefs about these products, which would

be likely to endure long after the advertisements cease. Furthermore, the³ conclusion appears inescapable that the false images and beliefs were created and/or reinforced by the advertisements.

Complaint counsel will also introduce documentary and testimonial evidence which will show that erroneous beliefs about the three products exist in the minds of substantial numbers of consumers and that such images will continue unless dispelled by corrective advertising measures. First, complaint counsel will introduce the results of numerous marketing studies, which will be analyzed by expert witnesses such as Drs. Ross, Davis, Cohen, Wilkie, Bass and Rossi. Most of these marketing studies, such as CX-305 through 342, were conducted by or for the respondents; however, others were conducted for the respondents in the companion analgesic cases, Dockets 8918 and 8919. See e.g. CX-343-348.

These studies show convincingly that substantial numbers of consumers believe that Bufferin relieves pain faster and produces less upset stomach than aspirin, that Excedrin is more effective and a stronger pain reliever than other products, that Excedrin PM is more effective for the relief of pain which occurs during the night than other products, and that all three brands are able to relieve tension. In addition, the expert witnesses will testify that because of the magnitude of the images as reflected in the marketing studies and the length

of time over which they have existed, it can be expected that these beliefs will endure into the future, absent corrective advertising.

Secondly, complaint counsel will introduce a study CX-349, which has been commissioned to measure current images and beliefs about Bufferin, Excedrin and Anacin. While complaint counsel believe that the results of the numerous marketing studies discussed above are adequate to determine that erroneous beliefs about the Bristol-Myers' products exist, it is important to provide the most up-to-date information possible on the issue of consumer images. Therefore, the study was commissioned in November, 1975, and the results will be available by early January, 1976. Dr. Clark Leavitt will testify as to the design and results of the study, which is being conducted by The Gallup Organization, Inc. Dr. Crespi of Gallup will testify as to the manner in which the study was conducted. In addition, the data produced by this study will be analyzed by several of the other marketing experts, such as Drs. Ray, Ross, Willie, Cohen, Rossi and Bass.

In addition to showing that erroneous beliefs exist in the minds of consumers, complaint counsel will also demonstrate that these beliefs were created and/or reinforced by respondents' advertising. First, complaint counsel will rely on the results of numerous advertising penetration studies from the

respondents' files. These studies, such as CX-325, 326 and 345, measure how well consumers recall advertising for the three products over extended periods of time and what advertising themes or messages are remembered. The results show that substantial numbers of the people tested recalled Bufferin, Excedrin and Excedrin PM advertising as stating that the brands are therapeutically superior to aspirin or other products and that they relieve tension.

The results of the consumer copy tests such as CX-245 through 304, will also be relied upon in regards to the corrective advertising remedy. Not only do the studies clearly show that the Bufferin, Excedrin and Excedrin PM advertisements convey representations concerning speed, strength and side effect superiority and tension relief, but that the magnitude of such communication and advertising recall is overwhelming.

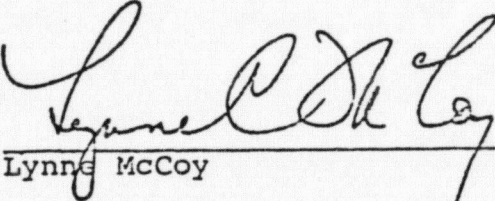
Complaint counsel's expert witnesses, such as Drs. Ross, Ray, Cohen, Wilkie, and Davis, will testify that the pervasive awareness of the therapeutic superiority and tension relieving advertising themes, as reflected in the penetration studies, and the overwhelming magnitude of communication and recall of those claims from the copy tests are convincing evidence that the erroneous beliefs shown

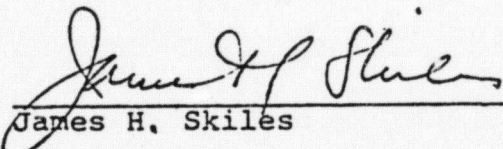
in the marketing studies were created and/or reinforced by advertising. In addition, they will testify that in their expert judgments they would expect the deceptive images to continue for many years, absent some intervening force such as corrective advertising. Finally, the witnesses will testify that corrective advertising */ is essential in order to allow those consumers who have been influenced by false advertising to rethink, on the basis of correct information, their purchase decisions and loyalty to respondents' products. Otherwise, consumers will continue to act under the influence of the deceptive advertisements, to the detriment of both the consumers themselves and the respondents' competitors.

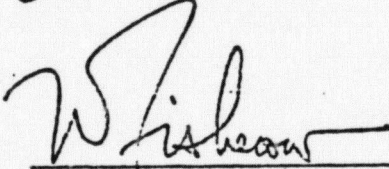
Finally, it will be shown that the corrective advertising order proposed by the staff will not be punitive and will not be beyond what is reasonably necessary to dispel the residual effects of respondents' deceptive advertising. (Issue 11(d))

*/ Several of complaint counsel's witnesses, such as Drs. Wilkie and Cohen, will testify concerning what form of corrective advertising will be necessary to dispel erroneous beliefs.

Respectfully submitted,

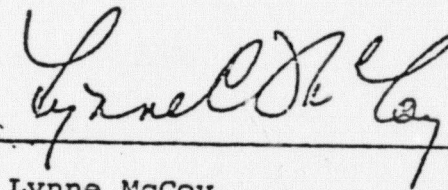

Lynne McCoy


James H. Skiles


W. Benjamin Fisherow

Dated: January 7, 1976

I hereby certify that I have this date served the foregoing document upon all other parties to this proceeding by hand delivery of the original and requisite number of copies to the Office of the Secretary, Federal Trade Commission, and by mailing copies thereof to Gilbert H. Weil, counsel for Bristol-Myers Company, Sidney S. Rosdeitcher, counsel for Young & Rubicam, International, Inc., and Marshall Cox, counsel for Ted Bates & Company, Inc.

A handwritten signature in cursive script, appearing to read "Lynne McCoy", is written over a horizontal line.

Lynne McCoy

Dated: January 7, 1976

Defendants' Reply Memorandum

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Plaintiff,

76 Civ. 2556 (CMM)

Defendants.

Preliminary Statement

-384a-

ARGUMENT

1. The issues and rights at stake in International Business Machine Corp. v. Edelstein, 526 F.2d 37 (2d Cir. 1975) ("IBM") which is cited by Bristol-Myers are simply not involved here, and that case is therefore inapposite. In IBM, which was a mandamus action against the District Court, the District Court had ruled that:

"... if any one of you seeks to interview a witness in the absence of opposite counsel, that you do it with a stenographer present and so that it can be available to the Court, for the Court to see it, and I think that is the kind of condition that I would ask you to live up to." 526 F.2d at 41 (Emphasis in appellate opinion.)

The Court of Appeals reversed that ruling and stated:

"We believe that the restrictions on interviewing set by the trial judge exceeded his authority. They not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles namely that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made." 526 F.2d at 42.

Thus, unlike the situation here, the District Judge had set a rule which absolutely barred private witness interviews by opposing counsel--even if the witness were willing; such an absolute rule, the Court of Appeals held, was improper. In this case, however, the Administrative Law Judge ("ALJ") has ruled in accord with the Court of Appeals' decision in the IBM case:

" . . . I think that perhaps the most effective way of meeting Opponent's expert testimony is an opportunity to impeach his credibility and for that purpose I think that an Opponent should be given every reasonable opportunity to pursue that course, including interviews with Opponent's prospective expert witnesses.

"Therefore, my ruling on this issue is that with respect to interviews of expert witnesses conducted on a voluntary basis, counsel of Opponent--strike that--the party calling that expert witness may be present at the interview of that witness by the other party provided that is a desire of that expert witness concerned, and Government counsel have my permission to communicate my ruling to your witnesses.

* * *

"And, of course, as I said, the same guidelines will apply with respect to [Bristol-Myers'] expert witnesses." Corsi Affidavit, Exhibit "A", p. 383.

Moreover, it can not be seriously disputed that the ALJ's statement that complaint counsel, as well as Bristol-Myers' counsel, is entitled to communicate this ruling to their prospective witnesses is correct. See, e.g., United States v. Matlock, 491 F.2d 504, 506 (6th Cir. 1974); United States v. White, 454 F.2d 435, 439 (9th Cir. 1972) (Advising a witness of his "right not to submit to the interview, did not deny the defendant a fair trial." Indeed, at the hearing before the ALJ on March 3, 1976, counsel for Bristol-Myers acknowledged this:

"[MR WEIL:] I think we are perfectly within our rights in asking [to interview the Commission's witnesses], even though it is their witnesses and beyond that I am sure it is nothing that they cannot protect themselves on and probably already have, by notifying or telling these witnesses that they need not meet with us without Complaint Counsel or some other of the Federal Trade Commission representative being present." Corsi Affidavit, Exhibit "A", p. 385.

Thus, contrary to Bristol-Myers' present unsubstantiated charges, complaint counsel has adhered to the well-recognized rule that if the witness so desires, counsel is entitled to be present at any interview by

opposing counsel, and that it is also entitled to so notify its witnesses. (Compare complaint counsel's statements at pp. 385-86 with the edited version thereof appearing at p. 9 of Bristol-Myers' Memorandum.) Moreover, the ALJ has made it abundantly clear to Bristol-Myers that it may "move for appropriate relief should any case of improper influence come to light." (ALJ's Order dated March 23, 1976 which is annexed to the Corsi Affidavit as Exhibit "B".) The ALJ has repeatedly reiterated that position (ALJ's Orders of April 5 and April 20, 1976 which are Exhibits "C" and "D" to the Corsi Affidavit), and to date, Bristol-Myers has come forward with nothing.*

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- * The letter from Dr. Rene Menguy dated March 5, 1976 and cited by Bristol-Myers in its papers dated April 21, 1976, simply does not substantiate Bristol-Myers' claim of improper conduct by complaint counsel. That letter makes clear that Dr. Menguy contacted complaint counsel concerning Bristol-Myers' request for an interview; as complaint counsel stated at the administrative hearing:

"These people know what is going on. Many of them have testified in proceedings before, and they have no desire, at least from what they have communicated to us, to meet with Mr. Weil and the other attorneys on Respondents' side without having us present, so, I think, in virtually no case, is it ever going to occur the witness would not automatically think to ask whether we could be present. This is how we have, of course, heard about the fact Mr. Weil has contacted them and has even made this suggestion." Corsi Affidavit, Exhibit "A", p. 391.

Rather, Bristol-Myers has attempted to disrupt the on-going administrative proceeding by instituting this lawsuit and asking for a stay of that proceeding while it conducts irrelevant and unnecessary discovery. See "WHEREFORE" clause in the complaint. Its previous attempt to do so was rejected by this Court and the Court of Appeals, Bristol-Myers Company v. FTC, 469 F.2d 1116 (2d Cir. 1972), and this Court should again direct Bristol Myers to return to the administrative proceeding to present its alleged "evidence" of improper conduct, if indeed it has any, to that forum for appropriate relief.

2. As discussed more fully in the defendants' memorandum in support of their motion to dismiss (pp. 7-12), Bristol-Myers has failed to exhaust its administrative remedies and the complaint should be dismissed. Despite all of the pages Bristol-Myers devoted in its memorandum to this question (pp. 12-32), it simply failed to come to grips with the Second Circuit's holding in Bristol-Myers Company v. FTC, 469 F.2d at 1117:

"We believe that the claim is asserted prematurely and was properly dismissed for failure to exhaust administrative remedies. Judicial review of Federal Trade Commission proceedings is governed by Section 45(c) of Title 15, United States Code, which limits the power of review to final cease and desist orders and which makes review available in the courts of appeal.

. . . If formal adjudicative procedures subsequently result in a cease and desist order directed against Bristol-Myers, it seems clear that on review by this or any other court of appeals the company will have an opportunity to press the claim that it was entitled by statute to subpoenas during the informal negotiating process. [citations omitted]"

See Coca-Cola Company v. FTC, 475 F.2d 299, 304 (5th Cir.), cert. denied, 414 U.S. 877 (1973). Bristol-Myers should not be permitted to "prolong the administrative proceedings through efforts to obtain premature judicial review"* and thus this Court should dismiss this action.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should dismiss this

* Bristol-Myers Company v. FTC, 469 F.2d at 1119.

LGC:n

complaint for lack of subject matter jurisdiction
and failure to state a claim upon which relief can be
granted.

Dated: New York, New York

October 4, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for Defendants.

LOUIS G. CORSI
Assistant United States Attorney,

WILLIAM A. HORNE
Attorney, FTC,

Of Counsel.

Service of three ③ copies of the within
is admitted this 11TH day of February 19 77

RECEIVED

Robert B. Fisher Jr.
UNITED STATES ATTORNEY

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